89-1718

No. 89-____

Supreme Court, U.S.
FILED
MAY 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BANQUE DE PARIS ET DES PAYS-BAS,

Petitioner,

—v.—

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DONALD F. LUKE
Counsel of Record
KENNETH L. MILLER
NANCY L. HAHN
Rogers & Wells
200 Park Avenue
New York, New York 10166
(212) 878-8000

Of Counsel:

HENRY PAUL MONAGHAN
435 West 116th Street
New York, New York 10027
(212) 854-2644

ROBERT HAYDEN BURNS
CONSTANCE O'DOHERTY BARNES
Butler & Binion
1600 Allied Bank Plaza
Houston, Texas 77002
(713) 237-3171

Attorneys for Petitioner

QUESTIONS PRESENTED

This diversity case is before this Court a second time following remand in 1988 to the United States Court of Appeals for the Fifth Circuit. In 1987, the court of appeals initially found, relying upon Texas Supreme Court authority endorsing the use of sound commercial practice in construing letters of credit, that petitioner was not liable on a standby letter of credit. After the court of appeals refused to reconsider its decision on the basis of a subsequent, but unpublished, decision of one of fourteen Texas intermediate appellate courts, this Court granted certiorari.* Six months later, this Court remanded for further proceedings after respondent successfully maneuvered publication of the intermediate state court decision. The court of appeals then certified the controlling legal question to the Texas Supreme Court and expressed considerable doubt that the state intermediate appellate court's opinion accurately expressed the law of Texas. The Texas Supreme Court, however, refused to answer the certified question. In December 1989, the court of appeals then reversed its 1987 carefully-reasoned decision solely because it felt *bound* to defer to the holding of the state intermediate appellate court.

The Questions Presented:

(1) Is the Fifth Circuit's deeply-entrenched policy in diversity cases of virtually complete and inflexible deference to the holdings of state intermediate appellate courts (i) contrary to the principles established in *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967), and other decisions of this Court, and (ii) in conflict with *McKenna* v. *Ortho Pharmaceutical Corp.*, 622 F.2d 657, 661-63 (3d Cir.), *cert. denied*, 449 U.S. 976 (1980)?

(2) Has *West* v. *American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940) been so eroded that it should now be formally overruled?

---

* *Exxon Co., U.S.A.* v. *Banque de Paris et des Pays-Bas*, 485 U.S. 1020, *vacated and remanded*, 109 S. Ct. 299 (1988).

RULE 29.1 LISTING

The parent and non-wholly-owned subsidiaries of petitioner are listed in the Appendix ("App."), at pages 60-67.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
RULE 29.1 LISTING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
A. The Consequences of the Fifth Circuit's Policy	8
B. This Court's Decisions on Determining State Law	10
C. Conflict with the Third Circuit	12
CONCLUSION	15

TABLE OF AUTHORITIES

Cases	PAGE
Aloe Coal Co. v. *Clark Equip. Co.*, 816 F.2d 110 (3d Cir.), *cert. denied*, 484 U.S. 853 (1987)	12
American Triticale, Inc. v. *Nytco Servs., Inc.*, 664 F.2d 1136 (9th Cir. 1982).....	7
Becker v. *Interstate Properties*, 569 F.2d 1203 (3d Cir. 1977), *cert. denied*, 436 U.S. 906 (1978) ...	14
Bernhardt v. *Polygraphic Co. of Am.*, 350 U.S. 198 (1956).....	11
Birmingham Fire Ins. Co. v. *Winegardner & Hammons, Inc.*, 714 F.2d 548 (5th Cir. 1983)	8
CKB & Assocs., Inc. v. *Moore McCormack Petroleum, Inc.*, 734 S.W.2d 653 (Tex. 1987).....	9
Calvary Temple v. *Taylor*, 288 S.W.2d 868 (Tex. Civ. App.—Galveston, 1956, no writ).....	10
Colorado Interstate Gas Co. v. *Hufo Oils*, 802 F.2d 133 (5th Cir. 1986).....	8
Commissioner v. *Estate of Bosch*, 387 U.S. 456 (1967).....	*passim*
Entron, Inc. v. *Affiliated FM Ins. Co.*, 749 F.2d 127 (2d Cir. 1984)	7
Erie R.R. v. *Tompkins*, 304 U.S. 64 (1938)	*passim*
Ferens v. *John Deere Co.*, 110 S. Ct. 1274 (1990)	14
Fidelity Union Trust Co. v. *Field*, 311 U.S. 169 (1940).....	11
Fina Supply, Inc. v. *Abilene Nat'l Bank*, 726 S.W.2d 537 (Tex. 1987)	9

PAGE

Harris v. *Lukhard*, 733 F.2d 1075 (4th Cir. 1984). 7

Kerr Constr. Co. v. *Plains Nat'l Bank*, 753 S.W.2d 181 (Tex. App.—Amarillo 1987, writ denied) ... 4

King v. *Order of United Commercial Travelers of Am.*, 333 U.S. 153 (1948) 11

McKenna v. *Ortho Pharmaceutical Corp.*, 622 F.2d 657 (3d Cir.), *cert. denied*, 449 U.S. 976 (1980) .. i, 12, 13

Mott v. *Mitsubishi Int'l Corp.*, 636 F.2d 1073 (5th Cir. Unit A Feb. 1981)..... 8

National Sur. Corp. v. *Midland Bank*, 551 F.2d 21 (3d Cir. 1977) 12

Philipp Bros., Inc. v. *Oil Country Specialists Ltd.*, No. C-8191, slip op. (Tex. Jan. 17, 1990)..... 9

Republic Nat'l Bank v. *Northwest Nat'l Bank*, 578 S.W.2d 109 (Tex. 1978) 10

Ruth v. *Bituminous Casualty Corp.*, 427 F.2d 290 (6th Cir. 1970)..... 7

Safeco Ins. Co. v. *Wetherill*, 622 F.2d 685 (3d Cir. 1980) 12

Sifers v. *General Marine Catering Co.*, 892 F.2d 386 (5th Cir. 1990)..... 8

Silverberg v. *Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678 (11th Cir. 1983)..... 7

Six Companies v. *Joint Highway Dist.*, 311 U.S. 180 (1940)..... 11

Stoner v. *New York Life Ins. Co.*, 311 U.S. 464 (1940)..... 11

Temple-Eastex, Inc. v. *Addison Bank*, 672 S.W.2d 793 (Tex. 1984)..... 10

PAGE

Texas Employers Ins. Ass'n v. *Wermske*, 349 S.W.2d 90 (Tex. 1961) 10

West v. *American Tel. & Tel. Co.*, 311 U.S. 223 (1940) ..... *passim*

Westwind Exploration, Inc. v. *Homestate Sav. Ass'n*, 696 S.W.2d 378 (Tex. 1985) 10

Williams, McCarthy, Kinley, Rudy & Picha v. *Northwestern Nat'l Ins. Group*, 750 F.2d 619 (7th Cir. 1984) 7

Statutes

28 U.S.C. § 1254(1) (1982) 2

28 U.S.C. § 1332 (1982) 3

28 U.S.C. § 1441 (1982) 3

28 U.S.C. § 1652 (1982) 2

Rules

Sup. Ct. R. 10 6

Tex R. App. P. 90(i) 4

Other

Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 Yale L.J. 267 (1946) 11

Corbin, *The Laws of the Several States*, 50 Yale L.J. 762 (1941) 11, 14

J. Friedenthal, M. Kane & A. Miller, *Civil Procedure* (1985) 10, 12

PAGE

Friendly, *In Praise of Erie and of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383 (1960) ... 11

Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954) 12

1A Part 2 J. Moore, W. Taggart, A. Vestal, J. Wicker & B. Ringle, *Moore's Federal Practice* ¶ 0.307[2] (2d ed. 1989) 12

19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4507 (1982) 12

C. Wright, *Law of Federal Courts* (4th ed. 1983). 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

89-_____

BANQUE DE PARIS ET DES PAYS-BAS,

Petitioner,

—v.—

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Banque de Paris et des Pays-Bas (now known as Banque Paribas) (the "Bank") hereby petitions for a writ of certiorari and asks this Court to vacate the judgment below and remand the case for further consideration consistent with the principles of *Commissioner* v. *Estate of Bosch*, 387 U.S. 456 (1967).

OPINIONS BELOW

The 1986 opinion of the district court (App. 46) is not officially reported, but is reprinted at 828 F.2d 1127. The 1987 opinion of the court of appeals (App. 36) ordering judgment in favor of the Bank is reported at 828 F.2d 1121. This Court's order (App. 34) vacating that judgment and remanding the case to the court of appeals for further consideration

is reported at 109 S. Ct. 299. The March 27, 1989 and May 16, 1989 opinions of the court of appeals (App. 22, 11) respecting certification to the Texas Supreme Court are reported at 867 F.2d 1524 and 874 F.2d 234. The September 20, 1989 decision of the Supreme Court of Texas (App. 10) declining to answer the certified question is not officially reported. The December 8, 1989 opinion of the court of appeals (App. 1) reversing its 1987 decision and granting judgment in favor of respondent Exxon Company, U.S.A. ("Exxon") is reported at 889 F.2d 674.

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on December 8, 1989. On January 12, 1990, Exxon filed a motion with the court of appeals relating to attorney's fees which the court construed to be a petition for rehearing and which, on February 8, 1990, the court of appeals denied as untimely. *See* App. 9. On December 26, 1989, the Bank timely filed a suggestion for rehearing en banc which, on April 13, 1990, the court of appeals construed to be a petition for rehearing and denied. App. 52. On February 13, 1990 and March 30, 1990, this Court entered orders (App. 59, 58) enlarging the Bank's time for filing a petition for a writ of certiorari to and including May 7, 1990. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTE INVOLVED

The Rules of Decision Act, 28 U.S.C. § 1652 (1982), provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

This case raises important and systemic institutional questions in the administration of the doctrine announced in *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). The petition is not concerned with whether the court of appeals correctly interpreted the relevant (*i.e.*, Texas) state law it was required to apply. Rather, the petition presents, in dramatic form, a question of wide-ranging, institutional importance: whether the Fifth Circuit's now deeply-entrenched policy in diversity cases of inflexible deference to the decision of a single state intermediate appellate court disregards important principles established by this Court for determining how to ascertain the content of state law?

Exxon's action against the Bank for wrongful dishonor of a letter of credit was commenced in 1982 in a Texas state court, and was removed to the United States District Court for the Southern District of Texas on the basis of diversity of citizenship. 28 U.S.C. §§ 1332, 1441 (1982); App. 13. The Bank disclaimed liability on the letter of credit because Exxon did not present the documents required by the credit within the time specified by the credit's express expiry date. After extensive discovery, both sides moved for summary judgment. App. 46. In 1986, the district court granted Exxon's motion (App. 46, 51), in a brief opinion devoid of any analysis of the law applicable to letters of credit.

The court of appeals reversed. The court's careful and elaborate opinion, written by Judge Rubin, drew heavily on well-established principles of Texas letter of credit law. The court stated that there was "no uncertainty on the face of the letter as to its expiration date," a date which was "as certain as words permit." App. 43. The court noted that "[g]ood banking practice and common sense require that the bank's liability terminate at a date certain." *Id.* The court concluded:

> In letter-of-credit transactions, as in many other legal areas, certainty of result and practicality of performance

> by laymen are of paramount importance. As Exxon asserts, it was required to comply with "whatever requirements that [the Bank] established" "to the last comma, the last semicolon, . . . and, if they [did] that, they [were] entitled to be paid." It follows that, if Exxon did not do that, it was not entitled to be paid.

App. 45. The court held that the letter of credit's clearly-stated expiration date controlled. *Id.* Judge Garza dissented. *Id.* Exxon's suggestion for rehearing en banc was denied on December 8, 1987. App. 54.

Shortly after the court of appeals' decision, one of the fourteen intermediate appellate courts in Texas issued a brief, unpublished opinion in a case involving another letter of credit that, by its terms, also expired before the beneficiary presented the required documents. *Kerr Constr. Co.* v. *Plains Nat'l Bank*, 753 S.W.2d 181 (Tex. App.—Amarillo 1987, writ denied). The unpublished opinion did not discuss Judge Rubin's opinion or substantively address any of the decisions of the Texas Supreme Court on letters of credit. The *Kerr* court, however, ruled that the stated expiry date in that letter of credit did not control. *See* App. 6-7. Exxon's subsequent motion to the court of appeals to file a second petition for rehearing was denied on the ground that an unpublished opinion lacks any precedential value in Texas. Tex. R. App. P. 90(i); App. 56, 57.

In March 1988, Exxon filed a petition for certiorari in this Court and simultaneously embarked on a truly extraordinary effort to extract some litigation advantage from the Texas state courts. *Kerr* was then pending before the Texas Supreme Court on an application for a writ of error. Exxon entered the *Kerr* litigation as an "amicus curiae" seeking, *inter alia*, publication of the intermediate appellate court's opinion.

In April 1988, this Court granted certiorari in this case, apparently to consider what effect, if any, unpublished opinions, such as *Kerr*, should have in guiding federal courts in determining the content of state law in diversity cases.

App. 35. Two days later, the Texas Supreme Court denied the application for a writ of error in *Kerr* and refused to order publication of the intermediate appellate court's opinion. In May 1988, the Texas Supreme Court denied yet another motion by Exxon to obtain publication of *Kerr*. Exxon then "appealed downwards" to the intermediate appellate court and filed a motion there to obtain publication of that court's November 1987 opinion. In July 1988, the intermediate appellate court ordered its earlier opinion published, and in October 1988, this Court vacated the 1987 judgment of the court of appeals in this case and remanded for further consideration in light of *Kerr*. App. 34.

On remand, the court of appeals expressed clear doubts that the *Kerr* opinion, albeit now published, accurately stated the law of Texas:

> [I]t is not clear whether or not the Texas Supreme Court would consider *Kerr* a proper elaboration of Texas law on letters of credit. Were it to be confronted with the issue raised in *Kerr* in a later case important to the jurisprudence of the state, the Texas Supreme Court might grant review and correct whatever error it saw in *Kerr*.

App. 25-26; *see also* App. 2; App. 14. The court of appeals thereupon certified the controlling state law issue to the Texas Supreme Court. App. 11.

On September 20, 1989, the Texas Supreme Court entered a terse, one sentence order declining to answer the question certified because "the question certified is dependent upon issues of fact." App. 10.

The court of appeals thereafter simply reversed its October 1987 decision, based on the published *Kerr* opinion which the court had refused to consider when it existed but was unpublished. Although expressing puzzlement at the action of the Texas Supreme Court (App. 3), the court of appeals now concluded the opposite of what it had previously determined: that "under state law the letter of credit had not expired when presented to the issuer." App. 2. *Kerr provided the sole*

basis for the court's abandonment of its own careful prior opinion. Instead of examining all relevant sources of Texas law in an effort to determine how the Texas Supreme Court would resolve the question on the merits, the court of appeals mechanically deferred to the brief, unreasoned opinion in *Kerr*, concluding that "*Kerr* is binding on this court" unless the Bank could "convince us that the Texas Supreme Court thinks *Kerr* is wrong." App. 5, 4. The court's abdication to *Kerr* was quite complete. For example, from the *Kerr* court's failure even to consider or discuss sound commercial policy and any general principles of Texas letter of credit law, the court of appeals now concluded:

> [W]e too must resist the view of sound commercial policy on which we relied in part in [our October 1987 decision in favor of the Bank]. . . . As the *Kerr* decision makes clear, the distinctive aspects of letters of credit are of themselves irrelevant to deciding which provision of the letter should be given controlling effect.

App. 7.

The Bank's suggestion for rehearing en banc was filed on December 26, 1989 and was denied nearly four months later on April 13, 1990. App. 52.

REASONS FOR GRANTING THE WRIT

The Bank fully recognizes that a claim that a diversity court has misconstrued the applicable state law presents no ground for invoking this Court's certiorari jurisdiction. *See* Sup. Ct. R. 10. But *precisely* because this is so, this Court must ensure that the lower federal courts proceed in a correct manner to determine state law. That consideration should impel this Court to grant certiorari again in this case.

The Fifth Circuit's policy is to give conclusive effect to a single holding of any intermediate appellate court unless a litigant can somehow demonstrate the negative; *i.e.*, that the holding is not the law of the state. Such an inflexible rule of

deference, however, turns *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), which was intended to ensure parity of treatment between state and diversity courts, on its head. Rather than achieving the desired parity, the Fifth Circuit's policy means that, in the federal diversity court, litigants receive a brand of justice substantially inferior to that accorded in the state court. Furthermore, the Fifth Circuit's approach is in direct conflict with that of the Third Circuit, which requires the diversity court to predict how the state's highest court would decide. The Third Circuit's policy prohibits absolute deference to an intermediate appellate court opinion.[1]

This petition presents a salutary occasion for the exercise of this Court's guidance because it so graphically illustrates the consequences of the Fifth Circuit's policy. In this case the court of appeals abandoned its own, reasoned opinion that focused upon and analyzed the key decisions of the highest state court. It did so solely on the basis of an intervening appellate court opinion—an opinion that was laconic and unreasoned, an opinion that the court of appeals itself had earlier doubted expressed the law of Texas, and an opinion whose authoritative character is restricted to but *one* of fourteen regional districts.

---

1 The conflict between the Third and Fifth Circuits most clearly demonstrates the dramatically different processes by which diversity courts determine and apply state law. Other circuits have used a variety of conflicting approaches. *E.g.*, *Harris* v. *Lukhard*, 733 F.2d 1075, 1082 (4th Cir. 1984) (lower court opinions not controlling); *Entron, Inc.* v. *Affiliated FM Ins. Co.*, 749 F.2d 127, 132 (2d Cir. 1984) (intermediate state court opinion binding); *Williams, McCarthy, Kinley, Rudy & Picha* v. *Northwestern Nat'l Ins. Group*, 750 F.2d 619, 624 (7th Cir. 1984) (intermediate court opinion not binding); *Silverberg* v. *Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678, 690 (11th Cir. 1983) (intermediate court decision binding); *American Triticale, Inc.* v. *Nytco Servs., Inc.*, 664 F.2d 1136, 1143 (9th Cir. 1982) (obligated to follow intermediate court decision); *Ruth* v. *Bituminous Casualty Corp.*, 427 F.2d 290, 292 (6th Cir. 1970) (obligated to follow intermediate court decisions).

A. THE CONSEQUENCES OF THE FIFTH CIRCUIT'S POLICY

The court of appeals' unchallengeable deference to the holding of the Texas intermediate appellate court decision in this case is no aberration; it reflects deeply-entrenched circuit policy. The Fifth Circuit has consistently interpreted *Erie* as requiring near absolute deference to *any* pertinent intermediate appellate court decision that has addressed the particular question. *E.g.*, *Sifers* v. *General Marine Catering Co.*, 892 F.2d 386, 397 (5th Cir. 1990); *Colorado Interstate Gas Co.* v. *Hufo Oils*, 802 F.2d 133, 140-41 (5th Cir. 1986); *Birmingham Fire Ins. Co.* v. *Winegardner & Hammons, Inc.*, 714 F.2d 548, 550 (5th Cir. 1983); *Mott* v. *Mitsubishi Int'l Corp.*, 636 F.2d 1073, 1074 (5th Cir. Unit A Feb. 1981). For example, in *Birmingham*, the Fifth Circuit stated:

> That the [Texas intermediate appellate] court which decided *Miller* is not the highest court of Texas does not free this Court to disregard its holding. On the contrary: We consider ourselves *Erie*-bound to apply the law as it has been interpreted by the highest state court to rule on the matter. . . . Often, an intermediate appellate court's view of the applicable law is authoritative. . . .
>
> * * *
>
> Of course, if we were convinced from specific tangible circumstances that the supreme court of the state would hold differently from the lower state court . . . we would defer less to the opinion of the intermediate court.

714 F.2d at 550.

What is unusual in this case is that the consequences of the court's rigid adherence to intermediate appellate court decisions are not speculative. Prior to the belated publication of *Kerr*, no reported decision by any Texas court considered the letter of credit issue presented by the facts of this litigation. In its October 1987 opinion, the court of appeals considered itself free to consult Texas Supreme Court and intermediate

appellate court letter of credit cases, Chapter 5 of the Texas Business and Commerce Code, other federal and state court letter of credit decisions, scholarly writings, and the fundamental commercial policies that give letters of credit commercial vitality as security instruments. Having then considered all the available data extant at that time as to how the Texas Supreme Court would determine the issue, the court sustained the Bank's position in this case. The court even held firm in its decision while *Kerr* was an unpublished opinion. But following publication of *Kerr*, the Fifth Circuit completely abandoned itself to *Kerr*.

The change in the court's approach to determining state law was dramatic. In the December 1989 opinion, the very inquiries that were the center of the court's earlier opinion are now completely missing: there is no analysis of the broad panoply of legal principles governing letters of credit enunciated by the Texas Supreme Court; there is not even a passing reference to Chapter 5 of the Texas Business and Commerce Code or the 1974 revision of the Uniform Customs & Practice for Documentary Credits, to which the Bank's letter of credit was expressly subject. Indeed, so strongly did the court internalize the need for surrendering its own judgment that it felt obliged to view the lack of discussion of considerations of sound commercial policy in *Kerr* as now forbidding even the barest of such considerations.[2]

---

2 The court of appeals' sudden abandonment of any consideration of sound commercial practice is a particularly striking example of the bizarre results of the court's rigid policy of deference to intermediate appellate court decisions. There is simply no reason to believe that *Kerr* reflects the jurisprudence of the Texas Supreme Court in this respect. In dealing with letters of credit, the Texas Supreme Court has repeatedly *embraced*—not rejected—considerations of sound commercial policy. *See Philipp Bros., Inc.* v. *Oil Country Specialists Ltd.*, No. C-8191, slip op. (Tex. Jan. 17, 1990) (emphasizing the need to "maintain the strong commercial viability of letters of credit"); *CKB & Assocs., Inc.* v. *Moore McCormack Petroleum, Inc.*, 734 S.W.2d 653, 655 (Tex. 1987) (same); *Fina Supply, Inc.* v. *Abilene Nat'l Bank*, 726 S.W.2d 537, 541-42 (Tex. 1987) ("To engage its credit, a bank must be able to predict with certainty the possible range of its liability and must

Even more striking about the court of appeals' great deference to the state intermediate appellate court decision—and more harmful to the diversity litigant—is that the court's action accords *Kerr* far greater status than it would have received if this litigation had remained in the state court. A decision by a single Texas intermediate appellate court does not, of course, constrain the Texas Supreme Court in any way. *E.g.*, *Texas Employers Ins. Ass'n* v. *Wermske*, 349 S.W.2d 90, 94 (Tex. 1961). Indeed, such a decision does not even constrain the intermediate appellate courts in any of the thirteen other Texas judicial districts. *E.g.*, *Calvary Temple* v. *Taylor*, 288 S.W.2d 868, 871 (Tex. Civ. App.—Galveston, 1956, no writ). Quite plainly, if manifest injustice to and discrimination against diversity litigants are to be avoided, the federal courts must be accorded at least the same flexibility as the courts of the state in which they are sitting in ascertaining the state law to be applied in diversity matters. *See* J. Friedenthal, M. Kane & A. Miller, *Civil Procedure* 220-21 (1985).

B. THIS COURT'S DECISIONS ON DETERMINING STATE LAW

Erie R.R. v. *Tompkins*, 304 U.S. 64, 78 (1938), requires a diversity court to apply state law as enunciated by the state's highest court. Where the highest court of the state has not addressed the particular issue, however, the diversity court is required to predict what the highest court of the state would decide if the issue were presented to it:

> [T]he State's highest court is the best authority on its own law. If there be no decision by that court then fed-

---

be assured that the scope of this liability will not be altered."); *Westwind Exploration, Inc.* v. *Homestate Sav. Ass'n*, 696 S.W.2d 378, 380-81 (Tex. 1985); *Temple-Eastex, Inc.* v. *Addison Bank*, 672 S.W.2d 793, 795 (Tex. 1984); *Republic Nat'l Bank* v. *Northwest Nat'l Bank*, 578 S.W.2d 109, 116 (Tex. 1978) ("Having fully considered the policy behind our commercial statutes along with all relevant authorities, we conclude as a matter of law that the instrument before us is a valid, intra vires, and enforceable letter of credit.").

> eral authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court.

Commissioner v. *Estate of Bosch*, 387 U.S. 456, 465 (1967); *see also Bernhardt* v. *Polygraphic Co. of Am.*, 350 U.S. 198 (1956); *King* v. *Order of United Commercial Travelers of Am.*, 333 U.S. 153 (1948).

The court of appeals showed no sensitivity to this Court's decision in *Bosch* and other recent cases or to the obvious consequences of its policy that provides diversity litigants in the Fifth Circuit far less justice than they would receive in the state courts. Instead, the court simply cited this Court's decision in *West* v. *American Tel. & Tel. Co.*, 311 U.S. 223 (1940), one of several decisions of this Court decided in the immediate wake of *Erie* on the weight to accord state intermediate appellate court decisions.[3] The court below understood *West* as mandating deference to the intermediate appellate court unless there was a clear determination that the intermediate court's holding was not the law of the state. Language in *West* taken in isolation can be so understood. But to that extent *West* has not survived the test of time, nor should it have.

West is one of several decisions referred to by Judge Henry Friendly as "the excesses of 311 U.S. as to the respect that federal judges must pay to decisions of lower state courts." Friendly, *In Praise of Erie and of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383, 400 (1960). These decisions suggested some rule of inflexible deference to *any* state court expression of state law; and to that extent they were subject to unremitting criticism by commentator after commentator. *E.g.*, Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 Yale L.J. 267, 290-95 (1946); Corbin, *The Laws of the Several States*, 50 Yale L.J.

---

3 *See Fidelity Union Trust Co.* v. *Field*, 311 U.S. 169 (1940); *Six Companies* v. *Joint Highway Dist.*, 311 U.S. 180 (1940); *Stoner* v. *New York Life Ins. Co.*, 311 U.S. 464 (1940).

762, 766-77 (1941); Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 510 (1954). This Court subsequently articulated an approach far more responsive to the real underpinnings of *Erie*, and *Bosch* is generally regarded as a retreat from the rigid rule announced in the 311 U.S. cases.[4] Today it is well understood that

> the federal judge need no longer be a ventriloquist's dummy. Instead he is free, just as his state counterpart is to consider all the data the highest court of the state would use in an effort to determine how the highest court of the state would decide. This is as it should be. Unless this much freedom is allowed the federal judge, the Erie doctrine would simply have substituted one kind of forum-shopping for another.

C. Wright, *Law of Federal Courts* 373-74 (4th ed. 1983) (footnote omitted).

C. CONFLICT WITH THE THIRD CIRCUIT

The imperative need for this Court's guidance becomes even clearer when the Fifth Circuit's inflexible deference to intermediate appellate court holdings is contrasted with the approach of the Third Circuit, which consistently holds that it is not bound by decisions of state intermediate appellate courts. *See, e.g., Aloe Coal Co.* v. *Clark Equip. Co.*, 816 F.2d 110, 118-19 (3d Cir.), *cert. denied*, 484 U.S. 853 (1987); *Safeco Ins. Co.* v. *Wetherill*, 622 F.2d 685, 688-89 (3d Cir. 1980); *McKenna* v. *Ortho Pharmaceutical Corp.*, 622 F.2d 657, 662 (3d Cir. 1980); *National Sur. Corp.* v. *Midland Bank*, 551 F.2d 21, 28-31 (3d Cir. 1977). Instead, the ultimate focus of the Third Circuit is on how the highest state court *would* decide the issue—and not, as in the Fifth Circuit, on how an intermediate appellate court *did* decide the issue.

---

4 *See, e.g.*, J. Friedenthal, M. Kane & A. Miller, *Civil Procedure* 218-20 (1985); 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4507, at 87-91 (1982); 1A Part 2 J. Moore, W. Taggart, A. Vestal, J. Wicker & B. Ringle, *Moore's Federal Practice* ¶ 0.307[2], at 3086-88 (2d ed. 1989).

This is illustrated by the *McKenna* decision where, after referring to *Bosch*, the Third Circuit stated that

> disposition of such cases must be governed by a *prediction of how the state's highest court would decide* were it confronted with the problem. Although some have characterized this assignment as speculative or crystal-ball gazing, nonetheless it is a task which we may not decline.

622 F.2d at 661-62 (footnote omitted) (emphasis added). This means that *all* relevant sources of state law must be consulted:

> [A] federal court attempting to forecast state law *must* consider relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand.

Id. at 663 (emphasis added). The Third Circuit recognizes that mechanical application of selected state opinions, instead of considering all the pertinent authorities, will distort the diversity court's determination of state law:

> [B]lind adherence to state precedents "without evaluating the decision[s] in the light of other relevant data as to what the state law is, will result in injustice and a perversion of the state law which the federal court sets out to apply."

Id. (quoting 1A Part 2 J. Moore, W. Taggart, A. Vestal, J. Wicker & B. Ringle, *Moore's Federal Practice* ¶ 0.309, at 3112 (2d ed. 1979) (footnote omitted)). Moreover, it will also cause harm to the diversity litigant:

> A diversity litigant should not be drawn to the federal forum by the prospect of a more favorable outcome than he could expect in the state courts. But neither should he be penalized for his choice of the federal court by being deprived of the flexibility that a state court could reasonably be expected to show.

Becker v. *Interstate Properties*, 569 F.2d 1203, 1206 (3d Cir. 1977), *cert. denied*, 436 U.S. 906 (1978) (footnote omitted).

The Third Circuit's position stands in marked contrast to that of the Fifth Circuit. As noted, the fact that this Court will not review specific claims that state law has been misconstrued requires the Court to be especially sensitive when questions of process malfunctions are raised. This petition provides an opportunity for the Court to provide important guidance to the federal courts as to the process by which the *Erie* obligation is discharged. The considerations that should inform that process were aptly described by Professor Arthur Corbin almost fifty years ago:

> When the rights of a litigant are dependent on the law of a particular state, the court of the forum must do its best (not its worst) to determine what that law is. *It must use its judicial brains, not a pair of scissors and a paste pot.*

Corbin, *The Laws of the Several States*, 50 Yale L.J. 762, 775 (1941) (emphasis added). Only through the wise and experienced use of *all* the available sources is a diversity court able to give effect to the *Erie* rule which "remains a vital expression of the federal system and the concomitant integrity of the separate States." *Ferens* v. *John Deere Co.*, 110 S. Ct. 1274, 1280 (1990). The Fifth Circuit's mechanical adherence to state intermediate appellate court decisions, with blinders on as to other relevant state law authority, is radically at variance with this aim.

CONCLUSION

The petition for a writ of certiorari should be granted, the December 8, 1989 judgment of the Fifth Circuit should be vacated, and the case remanded with instructions to apply the principles of *Bosch*.

Dated: New York, New York
May 7, 1990

Respectfully submitted,

DONALD F. LUKE
Counsel of Record
KENNETH L. MILLER
NANCY L. HAHN
Rogers & Wells
200 Park Avenue
New York, New York 10166
(212) 878-8000

ROBERT HAYDEN BURNS
CONSTANCE O'DOHERTY BARNES
Butler & Binion
1600 Allied Bank Plaza
Houston, Texas 77002
(713) 237-3171

Attorneys for Petitioner

Of Counsel:

HENRY PAUL MONAGHAN
435 West 116th Street
New York, New York 10027
(212) 854-2644

89-1718

No. 89-____

MAY 7 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BANQUE DE PARIS ET DES PAYS-BAS,

Petitioner,

—v.—

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

DONALD F. LUKE
Counsel of Record
KENNETH L. MILLER
NANCY L. HAHN
Rogers & Wells
200 Park Avenue
New York, New York 10166
(212) 878-8000

Of Counsel:

HENRY PAUL MONAGHAN
435 West 116th Street
New York, New York 10027
(212) 854-2644

ROBERT HAYDEN BURNS
CONSTANCE O'DOHERTY BARNES
Butler & Binion
1600 Allied Bank Plaza
Houston, Texas 77002
(713) 237-3171

Attorneys for Petitioner

TABLE OF CONTENTS

PAGE

Appendix A

Opinion of the Court of Appeals 1

Appendix B

Texas Supreme Court Order Declining Certified Question 10

Appendix C

Opinion of the Court of Appeals dated May 16, 1989 Posing Question Certified 11

Appendix D

Opinion of the Court of Appeals dated March 27, 1989 Following Remand 22

Appendix E

Order of the United States Supreme Court dated October 31, 1988 Vacating Judgment and Remanding 34

Appendix F

Order of the United States Supreme Court dated April 25, 1988 Granting Writ of Certiorari 35

Appendix G

Opinion of the Court of Appeals dated October 8, 1987 36

PAGE

Appendix H

Order of the Court of Appeals dated April 13, 1990 Denying the Bank's Suggestion for Rehearing En Banc 52

Appendix I

Order of the Court of Appeals dated December 8, 1987 Denying Exxon's Suggestion for Rehearing En Banc 54

Appendix J

Order of the Court of Appeals Denying Exxon's Motion for Recall and Stay of Issuance of Mandate..... 56

Appendix K

Order of the Court of Appeals Denying Exxon's Motion for Leave to File Second Suggestion for Rehearing En Banc..... 57

Appendix L

Order of the United States Supreme Court dated March 30, 1990 Extending Time for Filing Petition 58

Appendix M

Order of the United States Supreme Court dated February 13, 1990 Extending Time for Filing Petition 59

Appendix N

Ruling 29.1 Listing..... 60

Appendix A

EXXON COMPANY, U.S.A., a DIVISION OF EXXON CORPORATION,

Plaintiff-Appellee, Cross-Appellant,

v.

BANQUE DE PARIS ET DES PAYS-BAS,

Defendant-Appellant, Cross-Appellee.

No. 87-2007.

United States Court of Appeals,
Fifth Circuit.

Dec. 8, 1989.

Order Denying Rehearing Feb. 8, 1990.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before RUBIN, GARZA, and JOLLY, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

In a diversity action against a bank for refusing to honor a standby letter of credit, we held that the obligation of the issuing bank had terminated even though it might not have been possible for the holder of the letter to present the documents required for payment before the expiry date stated in the letter.[1] Thereafter, and before the issuance of our mandate, an intermediate state court of appeals rendered an unreported opinion interpreting the effect of such an impasse differently. On application for rehearing, we refused to consider this opinion as precedent. The state supreme court refused to authorize publication of the opinion, but the court of appeals did. Granting a writ, the Supreme Court

1 828 F.2d 1121 (5th Cir. 1987).

remanded the case to us for reconsideration in the light of the published opinion. Concluding that the case before us is indistinguishable from the later state court decision, we hold that under state law the letter of credit had not expired when presented to the issuer.

I.

This tale has two chapters. Chapter I consists of the operative historical facts developed in the proceedings below. These are fully set forth in our first opinion, *Exxon I*[2] rendered on October 8, 1987. Chapter II is the extensive litigation history. On November 17, the Amarillo, Texas, Court of Appeals, rendered an unreported opinion in *Kerr Construction Co. v. Plains National Bank* that arguably indicated that a Texas court might reach a different result from that which we reached in *Exxon I*. The Texas Supreme Court denied a writ of review. Exxon sought rehearing, asking us to consider and follow *Kerr*, but, in *Exxon II*, we refused because under Texas law an unreported opinion is not precedential.[3] Exxon then applied to the Supreme Court for a writ. While the application was pending, the Texas Supreme Court denied a motion to publish *Kerr*, but the Amarillo Court of Appeals granted a similar motion, with the result that the opinion is now reported.[4]

The Supreme Court thereafter vacated our judgment and, in *Exxon III*, remanded the case "for further consideration in light of" *Kerr*.[5] Somewhat perplexed about the Texas Supreme Court's use of the term "writ denied," rather than "writ refused," in denying review of *Kerr* and considering the possibility that this phrase intimated that the *Kerr* opinion contained an error of law, we decided, in *Exxon IV*, to certify the question presented in this case to the Texas

---

2 Id.

3 835 F.2d 1433 (5th Cir. 1987).

4 753 S.W.2d 181 (Tex.Ct.App. 1987).

5 _____ U.S. _____, 109 S.Ct. 299, 102 L.Ed.2d 319 (1988).

Supreme Court.[6] In *Exxon V*, after obtaining the parties' recommendations regarding the statement of the issue, we formulated the question as follows:

> When a bank issues an irrevocable standby letter of credit that (i) contains a certification provision providing for payment to a beneficiary upon presentation of a signed statement certifying that the bank's customer did not perform an underlying obligation "between September and December, 1981," but (ii) also contains, in a subsequent paragraph, a presentation clause stating that such certification must be made "not later than October 31, 1981," when does the obligation of the issuing bank to honor its letter of credit terminate under Texas law?[7]

In *Exxon VI*, the state supreme court ordered that the question be "declined without answer" because the question "was dependent upon issues of fact."[8] With such assistance as may be derived from this Delphic refusal, we attempt to follow the Supreme Court's mandate.

II.

A federal court sitting in diversity is bound to follow decisions of the state's intermediate appellate courts unless it is "convinced by other persuasive data that the highest court of the state would decide otherwise."[9] There is, therefore, a working presumption that state intermediate appellate court decisions represent accurate statements of state law.

The Bank of Paris (Paribas) contends that *Kerr* misstates Texas law, resting its argument upon three interdependent contentions. First, the state supreme court's denial of writs in *Kerr* intimates that the appellate court's legal analysis was

---

6 867 F.2d 1524 (5th Cir. 1989).

7 874 F.2d 234, 236 (5th Cir. 1989).

8 No. C-8684 (Tex. Sept. 20, 1989).

9 *West v. AT&T*, 311 U.S. 223, 237, 61 S.Ct. 179, 183, 85 L.Ed. 139 (1940).

deficient in one or more respects. This is so, Paribas argues, because the court's order denying the writ contained the phrase "writ denied," a phrase indicating that the court was "not satisfied that the opinion of the court of appeals in all respects has correctly declared the law."[10] Second, although the *Kerr* opinion was in fact belatedly published by order of the appellate court, the state supreme court has refused to order its publication. According to Paribas, the state supreme court's steadfast refusal to publish *Kerr* suggests that the court considered it "unworthy" to be precedential. As Paribas correctly notes, under Texas law the state supreme court may decline to publish lower court opinions, and unpublished opinions have no precedential value.[11] Third, the *Kerr* decision is inconsistent with several state supreme court decisions concerning letters of credit.

These contentions fail to convince us that the Texas Supreme Court thinks *Kerr* is wrong. As we noted in *Exxon IV*, the first certification opinion, the implications of the state supreme court's "denial" of writs in *Kerr* are not clear.[12] The authorities cited do not persuade us that the court currently uses the notation "writ denied" only when it is dissatisfied with the appellate court's statement of the law. The Texas Supreme Court apparently uses this phrase also in those cases in which, for one reason or another, it chooses not to grant review.

Even if, however, we should conclude that the state supreme court was not "satisfied" that the Amarillo appellate court had correctly stated the law "in all respects" in its *Kerr* opinion, it is not clear what we should make of the court's dissatisfaction. That the supreme court was not "satisfied" might mean merely that it could not determine, without further study of the case, whether the lower court had in fact correctly stated the law.

---

10 Tex.R.App.P. 133(a) (West 1989).

11 Tex.R.App.P. 90(i) (West 1989).

12 867 F.2d 1524 (5th Cir. 1989).

The implications of the state supreme court's refusal to order publication of the appellate court opinion are even more indeterminate than are the implications of that court's "denial" of writs. Further, although Paribas argues that *Kerr* is incompatible with several cited Texas Supreme Court cases,[13] these cases bear only tangentially on the issue raised in *Kerr*. Indeed, that issue truly seems to have been res nova.

The reasons that the Texas Supreme Court gave for refusing to accept certification of the question that we posed to it lends further support to the conclusion that *Kerr* is not to be disregarded. Were *Kerr* not authoritative, the resolution of this case would not turn solely upon "issues of fact."

For these reasons, we conclude that *Kerr* is binding on this court under the *Erie* rule.

III.

Paribas also argues that even if *Kerr* is authoritative, there are significant differences between the facts in *Exxon* and those in *Kerr*. Certainly there are differences, but as every lawyer learns in his first semester of law school, precedential impact does not depend upon finding an identical, or to use the vernacular a "goose" or a "red pony," case.

With this in mind, we analyze the facts in *Kerr*. Cary Johnson, a subdivision developer, pursuant to an agreement with Kerr Construction, his paving contractor, obtained a letter of credit from Plains National Bank in favor of the City of Lubbock. The first paragraph of the letter authorized Lubbock to draw on the bank for Johnson's account if Kerr should "default[ ] or fail[ ] within ten (10) months to complete the paving improvements." Because the letter was issued on 9/17/84, this ten-month period would expire on 7/17/85. The last paragraph of the letter, however, indicated

---

13 *CKB & Assocs., Inc. v. Moore McCormack Petroleum, Inc.*, 734 S.W.2d 653 (Tex. 1987); *Fina Supply, Inc. v. Abilene Nat'l Bank*, 726 S.W.2d 537 (Tex. 1987); *Westwind Exploration, Inc. v. Homestate Sav. Ass'n*, 696 S.W.2d 378 (Tex. 1985); *Temple-Eastex, Inc. v. Addison Bank*, 672 S.W.2d 793 (Tex. 1984); *Republic Nat'l Bank v. Northwest Nat'l Bank*, 578 S.W.2d 109 (Tex. 1979).

that the letter would expire on 1/1/85, although the letter further provided that the expiration date would automatically be extended for six months unless the bank notified the beneficiary otherwise. Because the bank did not give the beneficiary such notice, the final expiration date became 7/1/85. Later, Kerr Construction defaulted. Lubbock's effort to draw on the bank, which was made on 7/17/85, was rejected by the bank on the ground that the letter had expired on 7/1/85.

On appeal, the Amarillo Court of Appeals described the "single issue" before it in these terms: what was "the due date of the letter of credit." The court began its analysis of the problem by observing that the first and last paragraphs of the letter were in "irreconcilable conflict." Although the court did not explain the nature of this "conflict," it is not difficult to reconstruct what the court was intimating. The first paragraph made the bank's liability contingent on Lubbock's certification that Kerr had failed to complete its work by 7/17/89. Lubbock, of course, could not make this certification until this date had passed. The last paragraph, however, indicated that the bank's exposure was to end by 7/1/89. Thus, if both paragraphs were given effect, the bank could never become liable, something the parties presumably could not have intended.

Having established the existence of the irreconcilable conflict, the court then set about determining which provision should control. For this purpose, the court resorted to certain basic maxims designed to aid courts in construing contracts in general. First, the court noted the rule that when there is an irreconcilable conflict between different provisions of an instrument, the first should be given effect. Application of this rule to the facts of *Kerr*, the court concluded, would lead to the enforcement of the first paragraph. Second, the court cited the rule that, when different provisions of an agreement are in irreconcilable conflict, the provision that "contributes most essentially to the agreement is entitled to the most consideration." According to the court, the first paragraph, because it "state[d] the condition precedent to the Bank's liability," was the more essential and significant provision of the letter. For these reasons, the court concluded that the

first paragraph controlled over the last and, therefore, that the bank remained liable under the letter at least through 7/17/85.

Several aspects of the *Kerr* decision are of particular significance. First, the court characterized the problem before it as one of contractual construction, a problem brought on by the presence in the agreement of mutually incompatible provisions concerning the time of performance. Second, and more important, the court resolved its interpretive problem by applying several stock rules for the construction of contracts. Absent from the opinion is any discussion of the policies implicated by the alternative constructions of the contract, for example, the need of banks and other commercial lenders for fixed and certain expiration dates in standby letters of credit and other similar security instruments. Accordingly, there is no indication whatsoever that the appellate court concluded, as a matter of policy, that the interests of financial markets would be better served by placing the risk of ambiguity in letters of credit upon the issuers rather than upon the beneficiaries. Accordingly we too must resist the view of sound commercial policy on which we relied in part in *Exxon I*.

Reading *Kerr* in this fashion, we conclude that, contrary to what we may have said in *Exxon I*, this case does present a problem of general contractual construction rather than the narrower problem of construing a specific kind of security instrument. The provision in the letter fixing the timing of Exxon's certification of default by Houston (documents "certifying that Houston . . . has failed to deliver . . . between September and December") and the provision fixing the expiration date (October 31, 1981) are in "irreconcilable conflict," as that phrase was used by the *Kerr* court. As the *Kerr* decision makes clear, the distinctive aspects of letters of credit are of themselves irrelevant to deciding which provision of the letter should be given controlling effect. Any conflict in the terms of such an instrument must, instead, be resolved by resorting to standard maxims of contractual construction. In the letter of credit at issue here, the provision setting forth the expiration date follows the provision establishing the time

for certification of default. Further, the certification provision, because it states a condition precedent to the bank's liability, is more "essential" to the contract as a whole than is the expiration provision. The interpretive maxims applied in *Kerr*, therefore, compel the conclusion that the date fixed in the certification provision controls over the expiration date.

The distinctions that Paribas attempts to draw between the facts of *Kerr* and those of this case do not mandate a different conclusion. According to *Kerr*, resolving ambiguities in a letter of credit is a matter of contractual construction. It follows, then, that unless any of the distinctive facts of this case implicate maxims of construction that were not implicated in *Kerr* and that would compel a different interpretation of Paribas' letter of credit, any differences between *Kerr* and this case are of no consequence to the question of how the ambiguity in that letter of credit should be resolved. Paribas has not brought any such maxim of construction to our attention, and we have been unable to think of one.

Although the distinctive facts of this case do not, therefore, have any significant bearing on the issue of contractual construction, they do, at least at first blush, seem to have some bearing on the quite different issue of equitable estoppel, an issue not presented in *Kerr*. Immediately upon issuance of the letter, Exxon realized that there was a problem with the expiration date. Indeed, Exxon later tried to cover itself by twice asking Houston to obtain an extension of that date. At no time, however, did Exxon contact Paribas to clear up the ambiguity. Paribas, faced with Exxon's silence and taking the expiration date at face value, decided to release its security when that date passed.

Although these facts may evoke sympathy for Paribas' position, they are insufficient to establish a claim of estoppel against Exxon. Under Texas law, one of the essential elements of the defense of estoppel is "reasonable or justified reliance" on the statements, silence, or conduct of the person

to be estopped.[14] Paribas had no knowledge of any of Exxon's potentially misleading statements or actions, for example, its efforts to have Houston change the expiration date; consequently, Paribas cannot claim that it relied on those statements or actions. Although Paribas can tenably claim that it relied upon Exxon's silence, rather than Exxon's actions, its reliance in this regard was not reasonable. Paribas' reliance on Exxon's silence could be considered reasonable only if it were established that, as a matter of law or of commercial practice, beneficiaries like Exxon have the primary responsibility for identifying and avoiding ambiguities in letters of credit as well as for initiating negotiations to eliminate them.[15] Absent some such rule placing the risks associated with ambiguities on one party or the other, the parties to an ambiguous letter of credit are in the same position as are parties to any other ambiguous contract: neither can assume from the other's silence that the other has tacitly acquiesced in the construction of the contract that favors him. *Kerr* informs us that Texas law does not, as a general rule, place the risks associated with ambiguity on the beneficiary.

For these reasons, we AFFIRM the judgment of the district court.

ORDER

Construing Exxon's Motion to Remand for Attorney's Fees as a petition for rehearing, it is DENIED. The motion is untimely. See Fed.R.App.Proc. 40.

---

14 *Douglas v. Aztec Petroleum Corp.*, 695 S.W.2d 312, 317 (Tex. Ct.App. 1985); *see also Traylor v. Gray*, 547 S.W.2d 644, 653 (Tex.Civ.App. 1977); *Clifton v. Ogle*, 526 S.W.2d 596, 603 (Tex.Civ.App. 1975).

15 *See generally Clifton*, 526 S.W.2d at 602 (reliance on silence may be justified if the silent party has a "duty to speak").

Appendix B

IN THE SUPREME COURT OF TEXAS

NO. C-8684

EXXON COMPANY, U.S.A., A DIVISION OF EXXON CORPORATION	§	
v.	§	U.S. CERTIFIED QUESTION
BANQUE de PARIS ET DES PAYS-BAS	§	

ORDER

The following question was certified to the Supreme Court of Texas by the United States Court of Appeals for the Fifth Circuit from an appeal styled *Exxon Company U.S.A., a Division of Exxon Corporation v. Banque de Paris et des Pays-Bas*, 874 F.2d 234, 236:

> When a bank issues an irrevocable standby letter of credit that (i) contains a certification provision providing for payment to a beneficiary upon presentation of a signed statement certifying that the bank's customer did not perform an underlying obligation "between September and December, 1981," but (ii) also contains, in a subsequent paragraph, a presentation clause stating that such certification must be made "not later than October 31 , 1981," when does the obligation of the issuing bank to honor its letter of credit terminate under Texas law?

Because it is the opinion of this court that the question certified is dependent upon issues of fact, a majority of the court hereby exercises its discretion to respectfully decline to accept the question. Tex. R. App. P. 114.

It is therefore ordered that the question be declined without answer, and the record returned to the United States Court of Appeals for the Fifth Circuit.

ORDER DELIVERED: September 20, 1989

Appendix C

EXXON COMPANY, U.S.A., A DIVISION OF EXXON CORPORATION,

Plaintiff-Appellee, Cross-Appellant,

v.

BANQUE DE PARIS ET DES PAYS-BAS,

Defendant-Appellant, Cross-Appellee.

No. 87-2007.

United States Court of Appeals,
Fifth Circuit.

May 16, 1989.

Before RUBIN, GARZA, and JOLLY, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT TO THE SUPREME COURT OF TEXAS, PURSUANT TO TEXAS CONSTITUTION ART. 5 § 3-c, and TEX.R.APP.P.114

TO THE SUPREME COURT OF TEXAS AND THE HONORABLE JUSTICES THEREOF:

1. STYLE OF THE CASE.

The style of the case in which this certificate is made is *Exxon Company, U.S.A., a division of Exxon Corporation, Plaintiff/Appellee/Cross-Appellant v. Banque de Paris et des Pays-Bas, Defendant/Appellant/Cross-Appellee*, Case No. 87-2007, in the United States Court of Appeals for the Fifth Circuit, on appeal from the United States District Court for the Southern District of Texas. The United States Supreme Court vacated the judgment of the Fifth Circuit Court of

Appeals rendered after an earlier hearing,[1] and remanded the case,[2] directing us to consider the decision of the Texas Court of Appeals in *Kerr Construction Co. v. Plains National Bank*.[3]

2. STATEMENT OF THE CASE.

In July, 1981, Exxon Company, U.S.A. entered into an oil exchange contract with Houston Oil & Refining, Inc. under which Exxon was to deliver 558,000 barrels of crude oil to Houston during July, 1981. The agreement required Houston to deliver an equal quantity of crude oil to Exxon during the period from September through December, 1981. The contract also required Houston to provide an irrevocable standby letter of credit. According to the contract, the letter of credit was to be payable to Exxon upon presentation of invoices or a statement by an officer of Exxon certifying that invoices were unpaid and ten or more days past due. See Appendix A.

Thereafter, Houston applied to Banque de Paris et des Pays-Bas for a letter of credit in the amount of $19,530,000. Because the issuance of the letter of credit was in effect an extension of credit by the Bank to Houston, the Bank required Houston to provide security sufficient to cover the amount of credit and blocked certain funds coming into Houston's account.

On July 16, 1981, the Bank issued the letter of credit using the language that had been supplied by Houston with respect to the documentary provisions and the expiry date. The letter provided for payment of $19,530,000 to Exxon upon Exxon's submission, *inter alia*, of a "[s]tatement signed by an authorized representative [of Exxon] certifying that Houston . . . has failed to deliver to Exxon . . . 558,000 barrels of [crude oil] . . . between September and December, 1981." The letter further provided, in a subsequent clause, that this certificate "must be presented not later than October 31, 1981."

---

1 828 F.2d 1121 (5th Cir. 1987).

2 _____ U.S. _____, 109 S.Ct. 299, 102 L.Ed.2d 319 (1988).

3 753 S.W.2d 181 (Tex.App.—Amarillo 1987, writ denied).

(Because October 31, 1981, was a Saturday, Exxon could also present the documents on the next business day, Monday, November 2, 1981). The letter also stated that it was subject to the 1974 revision of the Uniform Customs and Practice for Documentary Credits, a set of rules promulgated by the International Chamber of Commerce. See Appendix B.

In July, 1981, the Bank sent a copy of the letter of credit to the attention of Don Meiers, the Exxon employee responsible for receiving and transmitting letters of credit and monitoring their expiration dates. Meiers received the letter of credit and transmitted it to the appropriate executives at Exxon, accompanied by a letter stating that it is "due to expire October 31, 1981." Meiers' transmittal letter also noted that the credit covered the delivery of crude oil by Exxon during July and "the return" of the crude by Houston "between September and December 1981." See Appendix C. No one at Exxon commented to the Bank thereafter about the terms of the letter of credit.

During November, 1981, the Bank released both the security it had held for its extension of credit to Houston and the funds it had blocked in Houston's account.

In early November, 1981, Exxon learned that Houston would default on its obligation to make the delivery of crude oil required by the contract. On November 30, and again on December 1, 1981, Exxon presented its certification of Houston's non-delivery to the Bank. The Bank refused payment each time on the ground that the presentation was untimely.

Exxon brought this action against the Bank to recover on the letter of credit in the 234th Judicial District Court of Harris County, Texas. Invoking federal diversity jurisdiction, the Bank removed it to the United States District Court for the Southern District of Texas. After extensive discovery, both sides moved for summary judgment. The district court granted summary judgment for Exxon. On appeal, the United States Court of Appeals for the Fifth Circuit reversed and directed the entry of judgment for the Bank.[4] The

4 828 F.2d 1121 (5th Cir. 1987).

United States Supreme Court thereafter vacated that judgment and remanded the case to the Fifth Circuit for further consideration in the light of *Kerr Construction Co. v. Plains National Bank*,[5] which was published while the *Exxon* case was pending in the United States Supreme Court. Copies of the district court opinion, the original Fifth Circuit opinion, and the Supreme Court opinion are attached. Upon remand, a majority of the Fifth Circuit panel decided to certify the case to the Supreme Court of Texas, with Judge Reynaldo Garza dissenting from the need for certification. A copy of this opinion is also attached. Having decided to certify the controlling question of Texas law to the Texas Supreme Court, we will, of course, follow the decision of that court.

3. QUESTION CERTIFIED.

When a bank issues an irrevocable standby letter of credit that (i) contains a certification provision providing for payment to a beneficiary upon presentation of a signed statement certifying that the bank's customer did not perform an underlying obligation "between September and December, 1981," but (ii) also contains, in a subsequent paragraph, a presentation clause stating that such certification must be made "not later than October 31, 1981," when does the obligation of the issuing bank to honor its letter of credit terminate under Texas law?

We disclaim any intention or desire that the Supreme Court of the State of Texas confine its reply to the precise form or scope of the question certified.

5 753 S.W.2d 181 (Tex.App.—Amarillo 1987, *writ denied*).

APPENDIX A

EXXON COMPANY, U.S.A.
Post Office Box 2180—Houston Texas 77001

Supply Department
Commerce

Richard J. Kartzke
Raw Materials

July 9, 1981

Exxon Exchange Contract No. HR1-032

Houston Oil & Refining, Inc.
11221 Katy Freeway
Houston, Texas 77079

Attention: Mr. Ralph Carthae

Gentlemen:

This Contract, between Houston Oil & Refining, Inc. ("Houston Oil") and Exxon Company, U.S.A. (a division of Exxon Corporation) ("Exxon"), covers the exchange, for and in consideration of the agreements contained herein, of crude oil under the terms and conditions set forth.

Attached hereto as Exhibit A and made a part hereof are provisions specifying the terms and conditions of this exchange. The General Provisions on the reverse side hereof are made a part of this Contract.

Please return one fully executed copy of this Contract to the undersigned.

HOUSTON OIL & REFINING, INC.

By /s/ [Illegible]

VICE PRESIDENT
(Office or Title)

Date July 24, 1981

EXXON COMPANY, U.S.A.
(a division of Exxon Corporation)

By /s/ RICHARD J. KARTZKE
Richard J. Kartzke
Head—Raw Materials

Form Approved
By /s/

OCD:bp
Attachment

A division of Exxon Corporation

APPENDIX A—Continued

Houston Oil Contract No. 044-5250

Date July 9, 1981

EXHIBIT A
To Exchange Contract

1. TYPE OF CRUDE OIL AND QUANTITY:

   A. Houston Oil will deliver to Exxon approximately five hundred fifty-eight thousand (558,000) barrels of South Louisiana or West Texas Sour or Arab Light or Alaskan North Slope crude oils.

   B. Exxon will deliver to Houston Oil an equal amount of South Louisiana crude oil.

2. TERM:

   A. Exxon will deliver during July 1981.

      Houston Oil will deliver during September through December 1981.

3. DELIVERY AND TITLE:

   A. Houston Oil will deliver South Louisiana crude from Ship Shoal Pipeline facilities at St. James, Louisiana. Title and risk of loss will pass to Exxon as the crude enters recipient pipeline.

      Houston Oil will deliver West Texas Sour crude by pipeline into Shell Pipeline facilities at McCamey, Texas or into Exxon Pipeline facilities at Crane, Texas. Title and risk of loss will pass to Exxon as the crude enters said facilities.

      Houston Oil will deliver Arab Light and/or Alaskan North Slope by tanker into a mutually acceptable U.S. Gulf Coast port. Title and risk of loss will pass to Exxon as the crude passes the tanker's permanent hose connection at the point of discharge.

B. Exxon will deliver South Louisiana crude from Ship Shoal Pipeline facilities at St. James, Louisiana. Title and risk of loss will pass to Houston Oil as the crude enters recipient pipeline.

4. DIFFERENTIALS:

Barrel for barrel exchange. Houston Oil agrees to pay Exxon differentials on crude delivered to Exxon hereunder as follows:

Crude	$/B
South Louisiana for South Louisiana	Even
South Louisiana for West Texas Sour	0.99
South Louisiana for Arab Light	1.62
South Louisiana for Alaskan North Slope	2.36

Payment for differentials on volumes of crude delivered hereunder by pipeline will be made on the 20th day of the month following the month of delivery.

Payment for differentials on volumes of crude delivered hereunder by tanker will be made fifteen (15) days after discharge.

5. INDEPENDENT CARGO INSPECTION:

Exxon to arrange; cost to be shared equally.

6. IMPORTATION OF FOREIGN OIL:

Houston Oil will arrange and will pay import fees and duties on Arab Light delivered hereunder.

7. OTHER PROVISIONS:

Houston Oil will provide a $19,600,000 irrevocable letter of credit issued by a bank satisfactory to Exxon to cover value of crude delivered by Exxon hereunder. This letter of credit is payable to Exxon on presentation of invoices or statement of an officer of Exxon certifying that invoices are unpaid and past due ten (10) days or more.

The Ocean Tanker Marine Provisions attached hereto are incorporated herein and made a part of this contract.

The parties hereto do not intend to create between them by this agreement a continuing obligation to buy, sell, or exchange crude oil other than as specified in the termination provisions contained elsewhere herein. Accordingly, the parties hereby mutually agree to the termination provisions contained elsewhere in this agreement, and each party hereby expressly waives any rights it may have under any existing or future state or federal government regulations to insist upon the continued supply of crude oil provided herein.

(Invoices and shipping/loading papers covering the oil delivered hereunder should be sent to Exxon Company, U.S.A., Supply Accounting, P.O. Box 2024, Houston, Texas 77001.)

APPENDIX B

Banque de Paris et des Pays-Bas
400 Park Avenue
New York, N. Y. 10022

EXXON COMPANY U.S.A.
800 BELL, ROOM 3593
HOUSTON, TEXAS 77001
ATTN: DON MEIERS

July 16, 1981

GENTLEMEN:

WE HEREBY OPEN OUR IRREVOCABLE STANDBY LETTER OF CREDIT NUMBER 711828/FT, IN FAVOR OF YOURSELVES, BY ORDER AND FOR ACCOUNT OF HOUSTON OIL AND REFINING, INC., HOUSTON, TEXAS, AVAILABLE AT SIGHT, UP TO AN APPROXIMATE AMOUNT OF 19,530,000.00 USDLRS AGAINST:

1. COMMERCIAL INVOICE IN THREE COPIES COVERING APPROXIMATELY 18,000 BARRELS PER DAY OF SOUTH LOUISIANA LIGHT CRUDE OIL DELIVERED PIPELINE FACILITIES ST. JAMES, LA. DURING JULY, 1981.

2. COPIES OF PIPELINE TICKETS OR TRANSFER STATEMENT EVIDENCING DELIVERY AND/OR TRANSFER OF CRUDE OIL FROM EXXON COMPANY, U.S.A. TO HOUSTON OIL AND REFINING, INC.

3. STATEMENT SIGNED BY AN AUTHORIZED REPRESENTATIVE CERTIFYING THAT HOUSTON OIL AND REFINING, INC. HAS FAILED TO DELIVER TO EXXON COMPANY, U.S.A. 558,000 BARRELS OF ONE OF THE FOLLOWING: SOUTH LOUISIANA TO ST. JAMES, LA., WEST TEXAS SOUR TO SHELL, MCCAMEY OR EXXON, CRANE, ARAB LIGHT TO U.S. GULF COAST OR ALASKAN NORTH SLOPE TO U.S. GULF COAST BETWEEN SEPTEMBER AND DECEMBER, 1981.

SPECIAL CONDITIONS:

— PARTIAL DRAWINGS PROHIBITED.
— DRAWING PRIOR TO AUGUST 20, 1981 PROHIBITED.

DOCUMENTS MUST BE PRESENTED NOT LATER THAN OCTOBER 31, 1981.

WE HEREBY ENGAGE WITH THE BENEFICIARY THAT DOCUMENTS DRAWN UNDER AND IN COMPLIANCE WITH THE TERMS OF THIS CREDIT WILL BE DULY HONORED UPON PRESENTATION AS SPECIFIED.

IN CONFIRMATION OF OUR TELEX OF TODAY'S DATE.

THIS CREDIT IS SUBJECT TO THE UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1974 REVISION) INTERNATIONAL CHAMBER OF COMMERCE PUBLICATION NUMBER 290.

Yours faithfully,

/s/

BANQUE DE PARIS ET DES PAYS-BAS

APPENDIX C

EXXON COMPANY, U.S.A.
Post Office Box 2180 - Houston Texas 77001

Treasurer's Department

Dennis L. Doughty
Credit Manager

July 20, 1981

Letter of Credit
Houston Oil & Refining

Mr. D. P. Fraser

Houston Oil & Refining has provided an irrevocable bank letter of credit, No. 711828/FT as security for an exchange of crude oil under contract No. HR1-032. The letter of credit is drawn on the Banque de Paris et des Pays-Bas for $19,530,000 and is due to expire October 31, 1981. This letter of credit covers the delivery of 18,000 barrels/day of South Louisiana Light crude oil by Exxon during July and the return on these barrels by Houston Oil & Refining between September and December 1981.

The original of the letter of credit is being sent to you for safekeeping. Please sign below to indicate receipt and return to me in Suite 3763.

/s/
Donald H. Meiers

/s/
D.P. Fraser

DHM:mac
Attachment

c-w/attachment
Mr. O.C. Day
Mr. T.R. Reeves

Appendix D

EXXON COMPANY, U.S.A., A DIVISION OF EXXON CORPORATION,

Plaintiff-Appellee, Cross-Appellant,

v.

BANQUE de PARIS et des PAYS-BAS,

Defendant-Appellant, Cross-Appellee.

No. 87-2007.

United States Court of Appeals,
Fifth Circuit.

March 27, 1989.

Before RUBIN, GARZA, and JOLLY, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

On remand, the Supreme Court of the United States has directed us to consider *Kerr Construction Co. v. Plains National Bank*[1] and, taking that decision into account, to reconsider our prior opinion.[2] Because these cases raise an important issue of Texas state law left unsettled by *Kerr*, a case which may or may not control the outcome of *Exxon*, we, as a court exercising diversity jurisdiction, have decided to certify the decisive question in this case to the Supreme Court of Texas.

I.

In *Exxon*, we held that a bank's obligations under a letter of credit issued in good faith terminate on the date of expira-

---

1 753 S.W.2d 181 (Tex.App.—Amarillo 1987, writ denied).

2 *Exxon Co. v. Banque de Paris et des Pays-Bas*, 828 F.2d 1121 (5th Cir. 1987).

tion specified in the letter even when that date precedes the date on which the underlying contract will be completed. The underlying contract in *Exxon* consisted of an agreement by Houston Oil & Refining to deliver to Exxon 558,000 barrels of crude oil "during September through December 1981." To guarantee its performance, Houston obtained a letter of credit from Banque de Paris payable upon Exxon's presentation of enumerated documents, including certification that Houston "has failed to deliver to Exxon . . . 558,000 barrels . . . between September and December, 1981." The letter of credit set October 31, 1981 as its expiry date. Exxon could have insisted on amendments to the letter if it found any provisions unacceptable, but it did not do so. The record reveals that all parties understood that the expiry date occurred before the end of the term in which Houston could satisfy its underlying contractual obligations to Exxon.

We determined that the letter of credit issued by Banque de Paris to Exxon contained no ambiguity; "[t]he expiry date in the letter of credit is as certain as words permit."[3] Because "[t]he length of time that an issuer remains liable for a failure to perform by its customer is . . . a matter of critical importance to the issuing bank, to the customer who must pay for the credit, and to the regulatory authorities," the "need for a precise expiration date is particularly acute when a standby letter of credit is issued."[4] We, therefore, held that the letter "required no construction and that it terminated on its express expiry date."[5]

As a federal court sitting only by virtue of diversity jurisdiction, we are bound to follow Texas law in this case. After we had decided *Exxon*, the Court of Appeals for the Seventh District of Texas published *Kerr*, a case addressing a "single issue": the "due date of [a] letter of credit."[6] The letter of credit at issue in *Kerr*, dated September 17, 1984, "autho-

---

3 *Id.* at 1125.

4 *Ibid.*

5 *Id.* at 1126.

6 *Kerr*, 753 S.W.2d at 183.

rize[d]" its beneficiary "to draw" on the creditor bank if Kerr Construction "has defaulted or failed within ten (10) months to complete" its underlying contractual obligations. The letter of credit stipulated that it "shall be extended without amendment for an additional period of six (6) months from the expiration date hereof unless thirty (30) days prior to such expiration date" the bank elects not to renew it. The letter concluded: "[Y]our drafts . . . will be duly honored if presented to us on or before January 1, 1985 . . ."

The Texas intermediate appellate court found that "[t]he contract remained uncompleted on 17 July 1985, ten months after the date of the letter[,]" and that the "initial due date" of January 1 "was automatically extended until 1 July 1985."[7] In an opinion that initially remained unpublished, the court determined that "there is an irreconcilable conflict" between the "condition precedent to the Bank's liability"—the date of completion of the underlying contract, and the extended July 1 due date.[8] Because the court found the underlying contract "the most significant and essential provision in the [letter of credit] agreement,"[9] it held that the beneficiary of the letter of credit could draft against that letter until the date specified for performance of the underlying contract even though that date extended beyond the expiry date.

The Supreme Court of Texas denied Kerr's application for appeal with the notation "Writ Denied," and refused to publish the appellate court's opinion. The Seventh District Court subsequently published *Kerr*.

II.

Before determining the applicability of *Kerr* to the facts presented in *Exxon*, we must first decide the status of the *Kerr* opinion as a correct exposition of Texas state law. The

7 *Ibid.*

8 *Id.* at 184.

9 *Ibid.*

parties differ with respect to the meaning this court should give to the *Kerr* opinion, considering the manner in which the Texas Supreme Court phrased its denial of writ in that case.

Under Rule 133 of the Texas Rules of Appellate Procedure, the State Supreme Court may decline to hear a case in one of two ways: the court may "refuse" the writ, connoting that the "judgment of the court of appeals is correct and . . . the principles of law declared in the opinion . . . are correctly determined;" alternatively, the court may state "Writ Denied" to convey that it

> is not satisfied that the opinion of the court of appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error of law which requires reversal or which is of such importance to the jurisprudence of the State as to require correction . . .[10]

By denying, rather than refusing, the writ in *Kerr*, the Texas Supreme Court may have intimated that the appellate court's opinion contained an error of law. If this was the effect of the Texas court action, we are unable to detect what uncorrected error, if any, lurked in the Seventh District's opinion, and we are, therefore, unable to embrace its legal reasoning and conclusions as a correct enunciation of the single issue of state law with which it dealt.

It is possible that the Texas Supreme Court may have declined to correct the mistake in *Kerr* because the appellate court's unpublished decision did not affect the jurisprudence of the state since, under state law,[11] unpublished state court opinions cannot be "cited as authority by counsel or by a court." The Texas Supreme Court refused to publish *Kerr*, and the state appellate court published its opinion only after the State Supreme Court had denied Kerr a writ. Thus, it is not clear whether or not the Texas Supreme Court would consider *Kerr* a proper elaboration of Texas law on letters of

---

10 *See also* Texas Government Codes Ann. § 22.001(a)(6) (Vernon 1986).

11 Texas Rules of Appellate Procedure 90(i).

credit. Were it to be confronted with the issue raised in *Kerr* in a later case important to the jurisprudence of the state, the Texas Supreme Court might grant review and correct whatever error it saw in *Kerr*. It is precisely this review of the issue raised by *Kerr* and its resulting guidance that we, as a court sitting in diversity jurisdiction, require.

On the other hand, it is possible that, as Exxon contends, the Texas Supreme Court intimated no adverse implication by its use of the phrase, "Writ Denied," and that the phrase connoted simply a refusal to review the opinion.

Even if that is the case, however, and even if *Kerr* correctly states Texas law, its applicability to *Exxon* is not clear. The letter of credit in *Exxon* unambiguously prescribed an absolute expiration date; the letter in *Kerr* provided that the "expiration date . . . be [automatically] extended without amendment."[12] In *Exxon*, we found that the bank acted in good faith and fulfilled its obligations to all parties, that the beneficiary had opportunities to reform the letter of credit, and that each party knew that the expiration date preceded the date upon which the underlying contract could be satisfied; the *Kerr* court made no similar findings.

Because we are unable to determine whether *Kerr* correctly states Texas state law, and if it does, how that decision affects the issues here presented, we believe it necessary to certify to the Supreme Court of Texas the following question:

> When a standby letter of credit, issued in good faith, contains an expiry date that precedes the date by which complete performance of the underlying contract might take place, and all parties agree specifically to that expiry date, when does the obligation of the issuing bank to honor its letter of credit terminate under Texas state law?

We disclaim any intention or desire that the Supreme Court of the State of Texas confine its reply to the precise form or scope of the question certified.

---

12 *Kerr*, 753 S.W.2d at 183.

We direct counsel for the parties to confer as soon as practical and, within 15 days, to submit to this court a proposed agreed statement of the case and an agreed phrasing of the question or questions to be certified.[13] If the parties are unable to agree on either the statement of the case or the questions to be certified, the appellant will prepare a proposed statement of each, within 15 days, and within seven days thereafter, the appellee will prepare and file with this court its proposed objections and suggested changes to the appellant's suggestions.

GARZA, *Circuit Judge*, dissenting from the need to certify a question to the Supreme Court of Texas.

In my original dissent from the panel opinion I stated my conviction that the Texas District Court Judge had correctly applied Texas law. Subsequent to the original panel decision, the Texas Court of Appeals in Amarillo published *Kerr Construction Co. v. Plains National Bank*, cited at 753 S.W.2d 181 (Tex.App.—Amarillo, 1987, writ denied), a case that is virtually indistinguishable on the relevant facts from the case sub judice. Apparently the United States Supreme Court is convinced, as am I, that the *Kerr* case sets out the controlling law in Texas regarding the enforcement of letters of credit; that Court has directed us to reconsider our decision in *Exxon v. Banque de Paris et des Pays-Bas*, 828 F.2d 1121 (5th Cir. 1987) in light of *Kerr*.

Nevertheless, my brothers from Louisiana and Mississippi continue to resist the application of controlling Texas precedent; they have proposed to certify the question presented in the case to the Supreme Court of Texas. Because I find such a certification unnecessary as well as contrary to the purposes behind the proper use of certification, I must once again dissent.

---

13 *See West v. Caterpillar Tractor Company, Inc.*, 504 F.2d 967 (5th Cir. 1974); *Allen v. Estate of Carman*, 446 F.2d 1276 (5th Cir. 1971).

I would not bother the honorable members of the Supreme Court of Texas with certification of a question that has already been clearly answered by the Texas Court of Appeals at Amarillo. This is especially true since the Texas Supreme Court denied writ in the very case that answered the question presented for certification.[1]

The majority's decision to certify the question in this case places the Supreme Court of Texas in the position of having to distinguish the facts in the *Kerr* case from those in the case at bar. The task of distinguishing the facts in a case properly before us with the facts of every other case brought to our attention by the parties is *our* responsibility, not that of the Supreme Court of Texas. There is no principled distinction between the *Kerr* case and the case sub judice. But even if there were, it would constitute a misuse of the certification process to ask the Supreme Court of Texas to do for us what we should be doing for ourselves.

My colleagues continue to focus their attention on the expiry date of the letter of credit instead of focusing on the contract, the performance of which was to be guaranteed by the letter of credit.

---

1 Another, related, reason to resist the use of certification under these circumstances is the unnecessary delay that it causes in the resolution of a relatively simple case involving the enforcement of a letter of credit. The events giving rise to the cause of action here took place nearly nine years ago. The words of Justice Hale, of the Supreme Court of Washington, are particularly appropos to this case:

> If there ever was a way in which to delay a case as it moves slowly through the court, in my opinion, it would be the very procedure whereby at one stage the case comes to a halt in the federal system, moves over into the state system to await docketing, briefing, hearing, writing, filing of the opinion and petition for rehearing and then moves back into the system of origin to take its place on the judicial conveyor for resumption of proceedings in the federal system.

In re Elliot, 446 P.2d 347, 371, 74 Wash.2d 600 (1968) (Hale, J., dissenting).

Considerations of judicial economy and the swift resolution of claims counsel against cavalier resort to the certification procedure even where there is some doubt as to the application of local law. But where controlling law in the jurisdiction of venue is clearly set out in the official reporters of that state, then certification should not merely be exercised with caution—it should not be exercised at all.

I therefore dissent from the certification to the Supreme Court of Texas on the question presented in this case.

I attach to this dissent from the certification of the question as Exhibit A, the proposed opinion which I prepared upon the remand by the Supreme Court of the United States as a proper disposition of the case which my colleagues have rejected in favor of certification.

I have decided to present my Exhibit A to this dissent with the sole purpose of providing for the Supreme Court of Texas consideration of yet one more Texas judge's exposition regarding the controlling law in Texas on the question involved. I do not wish to imply in any manner what the honorable members of the Supreme Court of Texas should do with the certification by our court. I just wanted to make available to the honorable members of the Supreme Court of Texas my personal views from the prior proceedings in our court regarding the proposed disposition of the question presented.

EXHIBIT A

GARZA, Circuit Judge:

On remand from the United States Supreme Court, we have been directed to reconsider *Exxon Co. v. Banque de Paris et des Pays-Bas*, 828 F.2d 1121 (5th Cir. 1987) ("*Paribas I*") in light of *Kerr Construction Co. v. Plains National Bank*, 753 S.W.2d 181 (Tex.App.—Amarillo 1987, writ denied). We conclude that the panel decision in *Paribas I* is in irreconcilable conflict with controlling Texas law as set out in the *Kerr Construction* case. For this reason, we withdraw our previous decision in *Paribas I* and affirm the decision of the U.S. District Court for the Southern District of Texas.

The facts in this case are fully set out in our prior panel opinion at 828 F.2d 1121, 1122-24. For the purpose of our reconsideration, it will be necessary to discuss several salient aspects of the underlying dispute.

In July 1981, Exxon Company contracted to deliver 558,000 barrels of crude oil to Houston Oil & Refining, Inc. in return for the delivery of an equal quantity of crude oil by Houston to Exxon "during September through December 1981." The contract required Houston to provide an irrevocable standby letter of credit to cover the value of the oil delivered by Exxon.

Houston then applied to the Banque de Paris et des Pays-Bas ("Paribas") for a letter of credit in the amount of $19,530,000. As originally noted by the district court, two provisions of the letter of credit clash. The bank's obligation to pay Exxon arises, by the terms of the letter, upon the certification by Exxon that Houston failed to deliver the required volume of crude oil during the period between September and December 1981. The expiry date of the letter, however, requires that certification of non-delivery be made by October 31, 1981. Exxon learned in November that Houston was going to default. It presented certification of the default to Paribas on November 30, 1981, and again on December 1, 1981. Paribas rejected the certifications as untimely.

The district court found first that letters of credit under Texas law are subject to the same rules of construction that apply to ordinary contracts. It then ruled that "[a] construction in favor of Exxon is required by the rule that contracts must be construed to render performance possible." It found that the inconsistencies between the two provisions in the letter of credit rendered performance impossible. Had Exxon made a claim against the letter of credit before the expiry date of October 31, 1981, Paribas would have rejected it because Houston still had the months of November and December to deliver the required volume of crude. Yet, when Exxon presented a claim against the letter of credit after the expiry date, Paribas rejected it as untimely. Thus, from Exxon's perspective, the letter of credit was a nullity; performance was impossible. The district court therefore granted summary judgment in favor of Exxon.

On appeal, a majority reversed. We found that the need for a stipulated expiry date is "particularly acute when a

standby letter of credit is issued." *Paribas I*, 828 F.2d at 1125. We also found that Exxon should simply have rejected the letter of credit and refused to deliver the oil to Houston if it found the inconsistencies between the certification provision and the presentment clause unsatisfactory. Placing "paramount importance" upon certainty of result and practicality of performance, the majority held that the Paribas letter of credit "required no construction and that it terminated on its express expiry date." *Id.* at 1126. Upon reconsideration, we find that this ruling conflicts with the recent decision of the Court of Appeals of Texas in *Kerr Construction Co. v. Plains National Bank*, 753 S.W.2d 181 (Tex.App.—Amarillo 1987).[1]

In the *Kerr Construction* case, as in the case at bar, an irrevocable letter of credit was issued in which the certification provision conflicted with the expiration date. The bank in *Kerr Construction* had issued a letter of credit on September 17, 1984, which secured the obligation of one Cary L. Johnson to pay for certain paving work to be completed by Kerr Construction Company. The city of Lubbock, Texas was the beneficiary of the letter. The certification provision provided that the city's draft would be honored when accompanied by a signed statement from the mayor of Lubbock "that the contractor Kerr Construction Company has defaulted or failed within ten (10) months to complete" the required paving improvements. Thus, the bank's obligation to pay would arise ten months after the issuance date of the letter. That date was July 17, 1985. The ultimate expiration date of the letter of credit was July 1, 1985.

Kerr partially completed the paving job when Johnson began defaulting on payment. Kerr accordingly halted work on the project with the balance of the contract remaining unperformed. On July 17, 1985, the city drafted on the bank

---

1 When the *Kerr Construction* case was first brought to our attention, it was an unpublished opinion of the Court of Appeals of Texas. Rule 90(i) of the Texas Rules of Appellate Procedure states: "Unpublished opinions shall not be cited as authority by counsel or by a court." *Kerr Construction* has since been published and we are now bound to apply it in the case before us.

to pay the amount guaranteed in the letter of credit. The bank rejected the city's presentment as untimely since the stipulated expiration date had passed on July 1, 1985. Kerr Construction Company and the city sued to collect on the letter of credit. In its opinion, the Texas Court of Appeals stated that the single issue raised by the case was the due date of the letter of credit. It then proceeded to resolve the issue by construction of the document.

The court first noted that the certification clause "states the condition precedent to the Bank's liability and, as such, is the most significant and essential provision in the agreement." *Kerr Construction*, 753 S.W.2d at 184. It stated: "In the absence of a default or failure by Kerr Construction Company to complete the paving improvements within ten months from 17 September, 1984, there is no liability on the Bank." *Id.* The court then observed the rule, well-settled under Texas law, that "when there is an irreconcilable conflict between provisions in an agreement, the provision which contributes most essentially to the agreement is entitled to the most consideration." *Id.* [citations omitted]. In addition, the court noted the rule that "where there is an irreconcilable conflict between clauses or provisions in the contract, the expression in the clause or provision first appearing will control." *Id.* Under both rules, the court found the certification clause, rather than the expiration date, controlling as to the due date of the letter of credit. It awarded Kerr Construction Company and the City of Lubbock the amount guaranteed by the letter of credit, pre- and post-judgment interest, as well as attorneys fees.

The *Kerr Construction* case is directly on point. In the case before us, as in *Kerr*, the expiration of the letter of credit predates the occurrence of the conditions precedent to the bank's liability. In both cases, the certification clause is "the provision which contributes most essentially to the agreement." Likewise, in both cases, the certification provision is the expression that first appears in the document. Thus, in the case at bar, as in the *Kerr Construction* case, "the time stated in the [certification clause] prevails over the time stated in the [presentment clause.]" *Id.*

Accordingly, we withdraw our previous panel opinion in this case and AFFIRM the original district court decision. Exxon is entitled to judgment in the amount of $19,530,000. We remand to the district court for calculation of pre-judgment interest from January 1, 1982, post-judgment interest, court costs, the costs of this appeal and attorneys' fees, if any, all of which are to be taxed against appellee Banque de Paris et des Pays-Bas.

Appendix E

SUPREME COURT OF THE UNITED STATES

No. 87-1467.

Exxon Company, U.S.A.,

Petitioner

v.

Banque de Paris et des Pays-Bas.

Former decision, 108 S.Ct. 1572.

Case below, 828 F.2d 1121; 835 F.2d 1433.

Oct. 31, 1988. Judgment is vacated and case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Kerr Construction Co. v. Plains National Bank*, 753 S.W.2d 181 (Tex.App.—Amarillo 1987, writ denied).

Appendix F

SUPREME COURT OF THE UNITED STATES

No. 87-1467.

Exxon Company, U.S.A.,

Petitioner

v.

Banque de Paris et des Pays-Bas.

Case below, 828 F.2d 1121; 835 F.2d 1433.

Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

April 25, 1988. Granted.

Appendix G

EXXON COMPANY, U.S.A., A DIVISION OF EXXON CORPORATION,

Plaintiff-Appellee Cross-Appellant,

v.

BANQUE de PARIS et des PAYS-BAS,

Defendant-Appellant Cross-Appellee.

No. 87-2007.

United States Court of Appeals,
Fifth Circuit.

Oct. 8, 1987.

Before RUBIN, GARZA, and JOLLY, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Standby letters of credit are issued by banks to assure the prompt payment of money to a party to another contract in the event that the other contract is not performed in accordance with its terms. The issuing bank is required to make payment only if it is presented with specified documents. The function of letters of credit requires that they be succinct and clear, for their utility lies in the assurance they provide that payment will be made on the specified terms without delay or litigation.

In this action for the wrongful dishonor of a letter of credit on which payment was demanded after the stated expiry date of the credit, we find that the obligation of the issuing bank had terminated even though it might not have been possible to present to the bank the documents required for payment before the expiry date. We therefore reverse the district court judgment holding the bank liable.

I.

In July 1981, Houston Oil & Refining, Inc. entered into a contract with Exxon Company, U.S.A., under which Exxon would deliver 558,000 barrels of crude oil to Houston in July and Houston would deliver an equal quantity of crude oil to Exxon "*during* September through December 1981." Exxon made this trade because it had closed part of one of its refineries for maintenance and therefore had a surplus of crude oil. The contract required Houston to provide an irrevocable standby letter of credit to cover the value of the oil delivered by Exxon. It stated that the letter of credit was to be payable to Exxon "on presentation of invoices or [a] statement of an officer of Exxon certifying that invoices are unpaid and past due ten (10) days or more."

Houston then applied to Banque de Paris et des Pays-Bas, also known as Paribas, for a letter of credit in the amount of $19,530,000. In its application, Houston stated that the letter of credit was to be payable upon presentation of specified invoices; pipeline tickets or transfer statements; and a

> [s]tatement signed by an authorized representative certifying that Houston Oil & Refining, Inc. *has failed to deliver* to Exxon Company, U.S.A. 558,000 barrels of one of the following: South Louisiana to St. James, La., West Texas Sour to Shell, McCamey or Exxon, Crane, Arab Light to U.S. Gulf Coast or Alaskan North Slope to U.S. Gulf Coast *between September and December, 1981.*[1]

The application also expressly requested that the letter of credit expire on October 31, 1981.

Because the transaction was in effect an extension of credit to Houston, Paribas required Houston to provide security sufficient to cover the amount of the credit, and, as part of the security arrangement, the bank blocked certain funds coming into Houston's account. In addition, Paribas charged Houston a fee of $53,000 for establishing the credit.

---

1 Emphasis added.

On July 16, 1981, Paribas "opened" the credit by telex and delivered a copy of it to Exxon as requested by Houston. The credit stated that it was to be paid against the documents specified in the application, and that these documents "must be presented not later than October 31, 1981." Because October 31 would be a Saturday, the documents could also be presented on the next business day, Monday, November 2.[2] The credit also stated that it was subject to the 1974 revision of the Uniform Customs & Practice for Documentary Credits, a set of rules promulgated by the International Chamber of Commerce.[3]

Because the letter expired *on October 31*, yet covered deliveries *between September and December*, Paribas checked with Houston twice—both before and after issuing the letter—to make sure that the terms specified by Houston in its application were indeed what it had intended. Before the letter was issued, Flozella Telfair, the Paribas employee who dealt with the application, noted the apparent inconsistency and communicated with Houston. Upon receiving Houston's affirmation that the terms were correct, Telfair drew circles on the application around both the October 31 expiration date and the September-December period specified for delivery, and next to these terms made the notation "OK as per HOR and R.P." (HOR was Houston, and R.P. was Rene Perdreaux, a Paribas lending officer responsible for the Houston account.) Subsequently, after the letter had been issued, Hal Peist, a letter of credit professional at Paribas, discussed its terms with Robert Wheelock at Houston and asked whether a change in the expiration date was desired. Wheelock responded negatively.

When the credit was opened, Paribas sent a copy of the letter to the attention of Don Meiers, the Exxon employee

---

2 Tex.Bus. & Com.Code Ann. § 3.503(c) (Vernon 1968); Uniform Customs & Practice for Documentary Credits art. 39, para. a, Int'l Chamber of Commerce Pub. No. 290 (1974 rev), *reprinted in* H. Harfield, *Letters of Credit* 135, 154 (1979).

3 International Chamber of Commerce Pub. No. 290, *reprinted in* H. Harfield, *Letters of Credit* 135 (1979) [hereinafter cited as *Uniform Customs*].

responsible for receiving and transmitting letters of credit and monitoring their expiration dates. Meiers received the letter of credit and transmitted it to the appropriate executives at Exxon with a letter stating that it "is due to expire October 31, 1981." Meiers' transmittal letter also noted that the credit covered the delivery of crude oil by Exxon during July and "the return" of the crude by Houston "between September and December 1981." No one at Exxon complained or even suggested that these terms were not fully satisfactory.

Exxon was an experienced trader of crude oil. It commonly balanced its crude oil supply by entering into exchanges and, unless it was dealing with a major oil company, secured those exchanges by receiving letters of credit issued in its favor. Exxon knew from its experience that it could insist on the amendment of unsatisfactory letters of credit, and it followed the practice of delaying the delivery of crude oil to its trading partners until it had actually received a satisfactory letter.

Houston made no delivery of crude oil to Exxon during September or October of 1981. Before October 31, Meiers brought the problem of Exxon's exposure to loss under the exchange contract to the attention of higher management at Exxon. Exxon asked Houston to obtain an extension of the letter of credit, but did not communicate with Paribas. On October 30, Joe Imparato, the president of Houston and a former Exxon employee, said that he would extend the letter of credit on Monday, November 2; however, he did not do so. When Imparato visited Exxon during the week of November 2, he stated that Houston would not be able to return the crude oil under the contract, and asked whether Exxon would be willing to convert Houston's obligation into a long term debt. Exxon's representatives told Imparato that such an arrangement would be unsatisfactory, and that they would insist on performance as required by the contract.

During November, Paribas released both the security that it had held for its extension of credit to Houston and the funds that it had blocked in Houston's account. Subsequently, on November 30 and on December 1, Exxon attempted to obtain payment by presenting documents to Paribas. Paribas rejected both presentations as untimely.

II.

The district court found a "clash" between the expiry date in the letter and the dates specified for performance of the underlying contract. It held, however, that the letter of credit was not ambiguous because its meaning could be made certain "by application of the rules of [contract] construction." The court resolved the "inconsistency" in part by interpreting the letter of credit against its author, the bank—a rule of construction that generally applies only to clarify ambiguity[4]—and by reading the letter in such fashion as to make performance possible. The court thus construed the contract "in favor of Exxon" and, extending but not defining the expiry date, entered summary judgment in Exxon's favor.

III.

A letter of credit "means an engagement by a bank . . . made at the request of a customer . . . that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the credit."[5] The purpose of a standby letter is to insure that one or more parties to a contract will perform their duties under it.[6] The credit substitutes a known, accessible, and demonstrably impeccable source of funds in the event of default by the party whose performance it guarantees. Letters of credit facilitate commercial transactions, particularly in international commerce, by assuring certainty in application, consistency in interpretation across jurisdictional boundaries, and swiftness in execution. By

---

4 *See Richland Plantation Co. v. Justiss-Mears Oil Co.*, 671 F.2d 154, 156 (5th Cir. 1982); *Chevron Oil Co. v. E.D. Walton Constr. Co.*, 517 F.2d 1119, 1122 (5th Cir. 1975).

5 Tex.Bus. & Com.Code Ann. § 5.103(a)(1) (Vernon 1968).

6 *East Girard Sav. Ass'n v. Citizens Nat'l Bank & Trust Co.*, 593 F.2d 598, 601 (5th Cir. 1979).

eliminating credit risks, they reduce the cost of commercial transactions.

The transaction involves three separate contracts: The first one is the underlying commercial contract between two parties, one of whom will later apply to a bank for the letter, and the other of whom will be the beneficiary of the letter. The terms of this contract may not become known to the bank. The second contract is between the issuer of the letter of credit—typically a commercial bank—and its customer, who in applying for the letter asks the bank to draft the letter in conformance with specified terms. The third contract, the letter of credit itself, is between the issuer and the beneficiary.[7] The issuer unconditionally and irrevocably binds itself to pay a specified sum upon presentation of documents complying with the terms of the credit. The issuer's obligation to pay the beneficiary is generally independent of any obligation of the issuer's customer to the beneficiary,[8] and the issuer has no obligation to pay unless the beneficiary strictly complies with the conditions contained in the credit.[9] An issuer who makes payment upon a presentation that does not conform to the requirements of the credit loses its right to repayment from its customers.[10]

A letter of credit is therefore strictly construed.[11] The issuer is required to act in good faith and to observe any general banking usage, but is not charged with responsibility for knowledge or lack of knowledge of any usage of the trade in

---

7 *See East Girard Sav. Ass'n*, 593 F.2d at 601; *Sisalcords do Brazil, Ltd. v. Fiacao Brasileira de Sisal, S.A.*, 450 F.2d 419, 422 (5th Cir. 1971), *cert. denied*, 406 U.S. 919, 92 S. Ct. 1771, 32 L.Ed.2d 118 (1972); *Republic Nat'l Bank v. Northwest Nat'l Bank*, 578 S.W.2d 109, 112 (Tex. 1978).

8 J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* 711-12 (2d ed. 1971).

9 *Venizelos, S.A. v. Chase Manhattan Bank*, 425 F.2d 461, 464-65 (2d Cir. 1970); *see also Republic Nat'l Bank*, 578 S.W.2d at 114-15.

10 *Philadelphia Gear Corp. v. Central Bank*, 717 F.2d 230, 236 (5th Cir. 1983).

11 H. Harfield, *supra*, at 36.

which the customer and beneficiary are involved.[12] It must determine whether to make payment to the beneficiary "on the basis of the documents [presented to it] alone."[13]

A half century ago, when a particular letter of credit did not specify an expiration date, courts required that necessary documents be presented to the issuing bank "within a reasonable time."[14] Eventually, that formulation proved to be commercially unsatisfactory because it left a bank's obligation uncertain and open-ended. To solve this problem, the International Chamber of Commerce adopted the Uniform Customs & Practice for Documentary Credits. Article 37 of the *Uniform Customs* requires all letters of credit made subject to it to stipulate an expiry date. Paribas' letter of credit expressly incorporated by reference the *Uniform Customs*, and therefore by necessity stated a specific termination date.

The need for a precise expiration date is particularly acute when a standby letter of credit is issued. Although such a credit is different from a surety bond or a guaranty, it does assure payment in the event the account party fails to perform an underlying contract with the beneficiary, the terms of which may be unknown to the issuer. The standby credit is therefore an extension of a bank's credit to its customer and, for this reason, it is subject to the statutory and regulatory loan limits imposed upon lending institutions.[15] Because the issuer of a standby credit does not hold documents representing goods in a commercial transaction, it cannot look to those documents as security for repayment by its customer.[16] Therefore, the issuer must look solely to the financial strength of its customer and to whatever security it has required for issuance of the credit. The length of time that

---

12 Tex.Bus. & Com.Code Ann. § 5.109(a), (a)(3) (Vernon 1968).

13 *Uniform Customs* art. 8, para. c.

14 *See Lamborn v. Nat'l Park Bank*, 240 N.Y. 520, 148 N.E. 664, 666 (1925).

15 *Republic Nat'l Bank*, 578 S.W.2d at 114.

16 *See Consolidated Aluminum Corp. v. Bank of Virginia*, 544 F.Supp. 386, 393-94 (D.Md. 1982), *aff'd*, 704 F.2d 136 (4th Cir. 1983).

an issuer remains liable for a failure to perform by its customer is obviously a matter of critical importance to the issuing bank, to the customer who must pay for the credit, and to the regulatory authorities that monitor the bank's activities.[17] Good banking practice and common sense require that the bank's liability terminate at a date certain.

IV.

The issue before us is not the clarification of a contract susceptible to more than one interpretation. The expiry date in the letter of credit is as certain as words permit. The requirement in the letter that Exxon certify, no later than October 31, 1981, that Houston "has failed to deliver . . . between September and December, 1981" created no uncertainty on the face of the letter as to its expiration date.[18]

Counsel for both sides have stated that the phrasing of the required certification, that Houston "*has failed* to deliver" the crude oil, excludes the possibility of presentation before the end of the stated delivery period. If that were indeed Exxon's understanding, then it should have refused the letter when tendered. The terms of the credit departed in more than one respect from the Exxon-Houston contract. As we have noted, that contract provided that the credit was to be payable "on presentation of invoices or [a] statement of an officer of Exxon certifying that invoices are unpaid and past due ten (10) days or more," and also provided that deliveries were to be made *during* September through December. Houston instead applied to Paribas for a letter of credit requiring a statement "by an authorized representative certifying that Houston . . . has failed to deliver . . . between September and December." If either these discrepancies or the expiry date did not satisfy Exxon, it simply should have declined to accept the credit and refused to deliver oil to Houston.

---

17 *See* J. Dolan, *The Law of Letters of Credit* ¶ 5.03[3][e] (1984).

18 *Cf. Liberty Nat'l Bank & Trust Co. v. Bank of America Nat'l Trust & Sav. Ass'n*, 218 F.2d 831, 840-41 (10th Cir. 1955); *BA Commercial Corp. v. Hynutek, Inc.*, 705 S.W.2d 713, 715 (Tex.Ct.App. 1986, no writ).

Exxon's decision to deliver suggests the possibility that, as contended by counsel for Paribas, Exxon was relying at least in part in its business dealings with Houston and its relationship with Imparato, a former crude oil trader at Exxon.

Exxon does not suggest that Paribas acted fraudulently. Nor does Exxon allege that Houston specified the expiration date of October 31 as the result of inadvertence or mistake, or that Exxon was mistaken as to that date when it accepted the letter. Indeed, the evidence shows that Exxon employees noted the expiry date upon their receipt of the letter of credit and that in late October Exxon asked Houston to obtain an extension of the expiry date.

Exxon does assert that Paribas did not act in "good faith" toward Exxon when it issued a letter of credit that its employees had questioned as "not mak[ing] sense" when Paribas knew that the letter was designed to secure Houston's contractual obligations to Exxon. No authority has been cited to us, and we have found none, that imposes on an issuer a duty to the beneficiary to "make sense" of the customer's application. As provided by Tex.Bus. & Com.Code Ann. § 5.109(a), Paribas did owe a duty of good faith to Houston, its customer. Tex.Bus. & Com.Code Ann. § 1.201(19) defines the standard of "good faith" as "honesty in fact in the conduct or transaction concerned." As mentioned earlier, Paribas checked with Houston both before and after issuing the letter to make sure that the terms specified in the application were what Houston intended. Thus, Paribas acted honestly toward Houston. Paribas' acceptance of Houston's assurances could not indicate dishonesty toward Exxon, for the expiration date was apparent on the letter when Paribas delivered it to Exxon. Paribas could tell Exxon no more than what was on the face of the letter, and Paribas knew that Exxon could insist on amendments to the letter if it was not satisfied. Moreover, as already noted, Exxon has not alleged fraud against the bank or Houston. Paribas therefore complied entirely with the terms of the letter when it interpreted the credit as having expired on November 2 and released its security to Houston.

As a lawyer experienced in letter of credit transactions has written, cautioning issuers, "the legality of a letter-of-credit transaction should not be equated with its prudence or commercial sense."[19] In like measure, the issuer is not charged with determining the utility to, or prudence of, a beneficiary who acts in reliance on its letter of credit. In letter-of-credit transactions, as in many other legal areas, certainty of result and practicality of performance by laymen are of paramount importance. As Exxon asserts, it was required to comply with "whatever requirements that Paribas established" "to the last comma, the last semicolon, . . . and, if they [did] that, they [were] entitled to be paid." It follows that, if Exxon did not do that, it was not entitled to be paid.

We therefore hold that the letter of credit issued by Paribas required no construction and that it terminated on its express expiry date. The summary judgment is REVERSED and judgment is entered for Paribas.

GARZA, Circuit Judge, dissenting.

I respectfully dissent.

The majority, focusing on the expiry date and nothing else, in effect makes the letter of credit involved in this case a nullity.

I agree with the court below that if Exxon had made any claim against the letter of credit before October 31, 1981, the Banque would not have honored any claim because Houston Oil and Refinery, Inc. still had the months of November and December to return to Exxon the oil that they had received under the original contract between Houston Oil and Refining, Inc. and Exxon.

I am convinced that the Texas judge sitting on the court below, interpreting the letter of credit under Texas law, was

---

19 Harfield, *Code, Customs & Conscience in Letter-of-Credit Law*, 4 U.C.C.L.J. 7, 14 (1971).

correct. I would affirm the granting of summary judgment to Exxon on the basis of his memorandum opinion of September 17, 1986, which is attached as Appendix A to this dissent.

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EXXON COMPANY, U.S.A.,
Plaintiff,

vs.

BANQUE DE PARIS ET DES PAYS-BAS,
Defendant.

Civil Action No. H-82-3481

MEMORANDUM

This action requires the construction of a letter of credit (letter) issued by the Banque de Paris et des Pay-Bas (Paribas) for the benefit of Exxon Company, U.S.A., (Exxon) to secure an obligation of Houston Oil and Refining, Inc. (HORI). The parties have filed cross-motions for summary judgment. The court will grant Exxon's motion and deny Paribas's motion.

On July 9, 1981, Exxon and HORI entered into an oil exchange agreement (agreement). Exxon, finding that it had a temporary surplus of crude oil at its Baton Rouge refinery, contracted to ship HORI approximately 558,000 barrels of crude in July 1981, and HORI agreed to deliver the same amount of crude to Exxon during September through December, 1981. The agreement required HORI to secure its obliga-

tion by a letter of credit in favor of Exxon for $19,530,000. On HORI's application, Paribas, for a fee of approximately $50,000, issued the letter on July 16, 1981.

Two provisions of the letter clash. The certification provision requires that in order to collect under the letter, Exxon must certify that HORI failed to deliver the required volume of crude in September-December. On the other hand, the presentment clause requires the certification of non-delivery to be made by October 31, 1981. Exxon learned sometime in November that HORI was going to default. It presented the certification of HORI's default to Paribas on November 30, 1981, and again on December 1, 1981. Paribas rejected both presentments as untimely.

Exxon wants its money.

Making Sense of the Letter of Credit.

In the State of Texas letters of credit are subject to the same rules of construction that apply to ordinary contracts. *Temple-Eastex, Inc. v. Addison Bank*, 672 S.W.2d 793, 798 (Tex. 1984); *Republic Nat'l Bank v. Northwest Nat'l Bank*, 578 S.W.2d 109, 115 (Tex. 1978). The question of ambiguity in a contract is one of law. *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983); *R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc.* 596, S.W.2d 517, 518 (Tex. 1980). A contract is ambiguous only where its meaning remains uncertain after application of the rules of construction. The letter is not ambiguous.

Against the Drafter.

Inconsistencies must be resolved against the party who drew the contract. *Temple-Eastex, Inc.*, 672 S.W.2d at 798; *Republic Nat'l Bank*, 578 S.W.2d at 115. This rule seems especially compelling here. Deposition testimony shows that shortly after the letter was issued a Paribas employee noticed the inconsistency and discussed it with HORI. Paribas never sought to amend the letter to remove the contradiction or to notify Exxon.

Possibility of Performance.

A construction in favor of Exxon is required by the rule that contracts must be construed to render performance possible. *Temple-Eastex, Inc.*, 672 S.W.2d at 798; *Republic Nat'l Bank*, 578 S.W.2d at 115. Obviously Exxon could not have certified on October 31 that HORI had not delivered through the end of the following two months. Paribas argues that practices in the industry were such that in the normal course of things Exxon should have known by October 31 that HORI would default. Assuming that to be the case, it does not follow that Exxon was bound to make presentment by October 31. The presentment provision required Exxon to certify that HORI had defaulted, not that it probably would. It is difficult to believe that Paribas would have cheerfully paid $19,000,000 to Exxon for a default that had not yet taken place.

BA Commercial Corp. v. Hynutek, Inc., 705 S.W.2d 713 (Tex.App.—Dallas 1986, no writ), supports Exxon's position. In that case the court construed a letter of guaranty that required Hynuteck to certify by December 31 that certain payments were more than twenty-five days past due. A payment fell due on December 31, and Hynucek made demand upon the guarantor at the end of January.

Ignoring the dictum about the letters of credit generally, the court in *BA Commercial* identified and applied the rules of construction that resolve this case.

> [A] fair reading of the guaranty shows that such an interpretation would defeat the express intent of the parties.
>
> * * * * * *
>
> [R]equiring that 25 days notice be given by December 31, 1983, would, in effect, have made a proper demand technically impossible and, therefore, would be contrary to the intent of the parties.

BA Commercial, 705 S.W.2d at 716. The word "purpose" could be well substituted for "intent" in those two passages.

Exxon Could Have Lied.

Paribas, becoming disingenuous, maintains that there was nothing to stop Exxon from certifying by October 31 that HORI had defaulted, although a default had not occurred until mid-November. Paribas purports to have understood the certification simply as "a statement . . . allowing Exxon to recover the proceeds of the letter of credit at any time during the specified period that it believed itself to be at risk in the transaction." (Paribas's January 1986 memorandum of law, p. 15). The court rejects this interpretation of certification for three reasons. First, it strains the court's credulity to believe that Paribas would or should have paid on Exxon's representation that it was merely feeling insecure about HORI's future performance. HORI would have sued Paribas. Second, it is difficult to understand the reason for the requirement of certification if something less than an actual default were enough to trigger payment. One certifies the truth of specific, verifiable facts, not one's fears as to future performance. Had Paribas received a certification from Exxon of an unequivocal announcement of impending default by HORI, Paribas might have accepted it as an anticipatory breach or repudiation, but the facts do not give rise to that argument. Third and most important, where the plain wording of a letter of credit requires a party to certify the past occurrence of specific events, it is inimical to maintain that the actual truth of the certification is of no importance.

Election of Remedies.

Paribas also argues that Exxon cannot recover because Exxon has made an election of remedies. The basis of this claim is that, after failing to obtain payment from Paribas, Exxon in January 1982 entered into an agreement with HORI (1982 agreement). The purpose of this agreement was to rescue HORI's indebtedness to Exxon, both under the agreement that the letter was issued to cover and under another oil exchange agreement on which HORI had defaulted. In October 1982 HORI defaulted on the 1982 agreement. Exxon filed suit against it, and Paribas argues that in so doing Exxon

foreclosed its option to sue Paribas. The court does not agree.

Election of remedies is defined in Texas as "the act of choosing between two or more inconsistent but co-existent modes of procedure and relief allowed by law on the same set of facts." *Custom Leasing, Inc. v. Texas Bank & Trust*, 491 S.W.2d 869, 871 (Tex. 1973). The classic example of election of remedies involves a plaintiff's choice between two remedies that may be imposed on the same defendant, as between specific performance and damages in a contract case, or between negligence and intentional injury in a tort action. *Seegers v. Spradley*, 522 S.W.2d 951 (Tex.Civ.App.—Beaumont 1975), writ ref'd n.r.e.); *Fulmer v. Rider*, 635 S.W.2d 875 (Tex.App.—Tyler 1982, writ ref'd n.r.e.). Here, by contrast, Exxon is proceeding under what are really two distinct contracts with two distinct obligors: the letter and the 1982 agreement with HORI.

Accord or Novation.

Similar to the election claim, Paribas argues that the 1982 agreement constituted either an accord and satisfaction or a novation. Neither claim is tenable. There is no indication that there was an agreement express or implied, between Exxon and HORI that Paribas would be released from its responsibility. That intention to release Paribas must have been embodied in their agreement for an accord and satisfaction to exist to Paribas's benefit. *E.g.*, *San Benito Bank & Trust Co. v. Rio Grande Music Co.*, 686 S.W.2d 635, 640 (Tex.App.—Corpus Christi 1984, writ ref'd n.r.e.). There is also no novation between Paribas and Exxon since Paribas and Exxon did not reach any agreement. *See Dodson v. Sizenbach*, 663 S.W.2d 13, 16 (Tex.App.—Houston [14th Dist.] 1983, no writ); *Villarreal v. Laredo Nat'l Bank*, 677 S.W.2d 600, 607 (Tex.App.—San Antonio 1984, writ ref'd n.r.e.).

If HORI had performed the 1982 agreement and if Paribas had then paid Exxon, HORI may have been entitled to recover the payment from Exxon. That did not happen.

Conclusion.

A judgment will be entered in favor of Exxon for $19,530,000, pre-judgment interest at 6% from January 1, 1982, post-judgment interest, and costs of court, leaving attorneys' fees the only issue to be decided.

Signed on September 17, 1986, at Houston, Texas.

/s/ LYNN N. HUGHES

Lynn N. Hughes
United States District Judge

Appendix H

EXXON COMPANY, U.S.A., a DIVISION
OF EXXON CORPORATION,

Plaintiff-Appellee, Cross-Appellant,

v.

BANQUE DE PARIS ET DES PAYS-BAS,

Defendant-Appellant, Cross-Appellee.

No. 87-2007.

United States Court of Appeals,
Fifth Circuit.

Appeal from the United States District Court
for the Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 12-08-89, 5 Cir., 198_, ____ F.2d ____)
(April 13, 1990)

Before RUBIN, GARZA and JOLLY, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

Appendix I

EXXON COMPANY, U.S.A., a DIVISION
OF EXXON CORPORATION,

Plaintiff-Appellee, Cross-Appellant,

v.

BANQUE DE PARIS ET DES PAYS-BAS,

Defendant-Appellant, Cross-Appellee.

No. 87-2007.

United States Court of Appeals,
Fifth Circuit.

Appeal from the United States District Court
for the Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 10-08-87, 5 Cir., 198_, ____ F.2d ____)
(December 8, 1987)

Before RUBIN, GARZA and JOLLY, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

Appendix J

EXXON COMPANY, U.S.A., a DIVISION
OF EXXON CORPORATION,

Plaintiff-Appellee, Cross-Appellant,

v.

BANQUE DE PARIS ET DES PAYS-BAS,

Defendant-Appellant, Cross-Appellee.

No. 87-2007.

United States Court of Appeals,
Fifth Circuit.

Appeal from the United States District Court
for the Southern District of Texas

[Filed Feb. 12, 1988]

ORDER:

The motion of Appellee, Exxon Corporation, for recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED, because, inter alia, Rule 90(i) of the Texas Rules of Appellate Procedure states:

> Unpublished opinions shall not be cited as authority by counsel or by the court.

/s/ [Illegible]
United States Circuit Judge

Appendix K

EXXON COMPANY, U.S.A., a DIVISION
OF EXXON CORPORATION,

Plaintiff-Appellee, Cross-Appellant,

v.

BANQUE DE PARIS ET DES PAYS-BAS,

Defendant-Appellant, Cross-Appellee.

No. 87-2007.

United States Court of Appeals,
Fifth Circuit.

Appeals from the United States District Court
for the Southern District of Texas

[Filed Feb. 12, 1988]

ORDER:

The motion of Appellee, Exxon Corporation, for leave to file a second suggestion for rehearing en banc is DENIED.

/s/ [Illegible]
United States Circuit Judge

Appendix L

SUPREME COURT OF THE UNITED STATES

No. A-570.

Banque de Paris et des Pays-Bas,

Petitioner

v.

Exxon Company, U.S.A.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including
May 7, 1990.

/s/ BYRON R. WHITE
Associate Justice of the Supreme Court of the United States

Dated this 30th
day of March, 1990.

Appendix M

SUPREME COURT OF THE UNITED STATES

No. A-570.

Banque de Paris et des Pays-Bas,

Petitioner

v.

Exxon Company, U.S.A.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including
April 9, 1990.

/s/ BYRON R. WHITE
Associate Justice of the Supreme
Court of the United States

Dated this 13th
day of February, 1990.

Appendix N

Rule 29.1 Listing

Parent, Principal Affiliates and Non-Wholly-Owned Subsidiaries of
BANQUE PARIBAS
(formerly called Banque de Paris et des Pays-Bas)

Parent:

Compagnie Financiere de Paribas

Principal Affiliates and Subsidiaries Not Wholly-Owned*:

Banco Amazonas
Banque Paribas
Banque Paribas (Belgique) S.A.
Banque Paribas Cameroun
Banque Paribas Capital Markets, Ltd.
Banque Paribas Cote d'Ivoire
Banque Paribas Deutschland OHG
Banque Paribas du Canada
Banque Paribas Gabon
Banque Paribas Luxembourg S.A.
Banque Paribas Norge
Banque Paribas N.V.
Banque Paribas Pacifique
Banque Paribas Polynesie
Banque Paribas (Suisse) S.A.
Banque Parisienne et Internationale
Banque Petrofigaz
Banque Pouyanne
Banque Sudameris
Bridel Emile
Bureau d'Etudes et de Transactions Immobilieres

---

* Excludes companies in which the interest of Compagnie Financiere de Paribas is less than 5% or $1 million.

Caisse Centrale de Reescompte
Campenon Bernard
Cap Groupe PLT
Carbone Lorraine
Cellulose du Rhone et d'Aquitaine
Chiers Chatillon
Cie Holding pour l'Aluminium
"COBEPA"

Main subsidiaries of COBEPA include the following companies:

Groupe 1
Compagnie de Participation Internationale
Compagnie de Participation Internationale (Nouvelle) N.A.
CDI
Compagnie Generale Mosane
Societe Financiere de Developpement et de Participations
Libelux S.A.
Agemar S.A.
Investerings en Beleggings Maatschappij Lacourt
Vlaamse Investerings en Beleggings-Maatschappij
Financial Control International
Groupe Financier Liegios
Regio
Cosylva
Cofim
Sogespar
Courcelles Nord
Sodemeuse
Paribas Realty
Paribas Participations Limitee
Sodepa

Cofimer
Coginvest
Cometra Grands Lacs
Compagnie Auxiliaire d'Enterprises et de Chemins de Fer
Compagnie Bancaire

Main subsidiaries of the Compagnie Bancaire group include the following companies:

Union de Credit pour le Batiment
Compagnie pour la Location d'Equipements Professionels
Union Francaise des Banques "UFB"
Fonciere de la Compagnie Bancaire
Credit a l'Equipement des Menages
Locabail Immobilier
Compagnie Francaise d'Epargne et de Credit
Societe d'Investissements Immobiliers de France
Societe d'Investissements Immobiliers de France Contructions
Comagnie pour le Financement de l'Industrie du Commerce & de l'Agriculture
SICAR
Locabail Energie
Kleber Portefeuille
Cardimo
Sofarim Habitation
Locabail Finance International Ltd.
Compagnie Financiere Kleber
Cardif
Cofibail Auto

Compagnie Bancaire USA Finance Corp.
Compagnie Centrale de Financement
Compagnie de Fives-Lille
Compagnie d'Enterprises Industrielles et Commerciales
Compagnie de Participations, de Recherches et d'Exploitation Petrolieres
Compagnie Financiere de Syrie et du Liban
Compagnie Fonciere
Compagnie Franco-Marocaine
Compagnie Generale de Developpement Immobilier
Compagnie Holding pour l'Aluminium
Compagnie Metallurgique et Miniere
Compagnie de Participations, de Recherches et d'Exploitation Petrolieres Espanola

Compagnie de Participations, de Recherches et d'Exploitation Petrolieres Minera
Compagnie de Participations, de Recherches et d'Exploitation Petrolieres Norge
Compagnie Luxembourgeoise de Television "CLT"
Conseil Investissement
Corexcal Inc.
Corexland
Courcoux Bouvet
Credit du Nord
Credit du Nord Belge
Credit Naval

Dolisos
Doux Ets
Droust Assurances

Enelfi Bretagne
Erbe S.A.
ETKC
Eurafrep
Eural Spaarkas N.V.
Eurocem, Inc.

Financiere du Caz et de l'Energie
Financiere Gabonaise de Developpement Immobilier
Fougerolle

GB Inno B.M.
Gevaert
Groupe Bruxelles-Lambert
Groupe Credit du Nord

Main Subsidiaries of the Credit du Nord group include the following companies:

Banque Nuger Pierre
Banque Nicolet, Lafanechere et de L'Isere
Union Bancaire du Nord
Banque Tarneaud Freres et Cie
Banque Joire Pajot et Martin
Caisse Generale de Depots et d'Avances

Societe Immobiliere et Financiere d'Investissements et de Coordination
Banque Lenoir et Bernard
Banque Arnaud Gaidan
Sedel
Norbail
Banque de Marches et d'Arbitrage

Historische Gebouwen
HRI Dolisos America

IHC Caland N.V. (and subsidiaries)
Immobiliere Rosiers
Immo-Paribas S.A.
Imosa
Interven
Itag

Knoedler-Modarco

Laiteries Emile Bridel
Lectra Systeme
Logibail

Maneurop
Mestrezat
Multireal S.A.

Nantes Navires Participations
Neficom
Niegeria Merchant Banking Corporation
Nord-Est
Nouvelle Compagnie Financiere pour l'Outre-Mer
Nouvene Cofimer
Novolease S.A.

OCEFI
"ODGH" Omnium de Developpement et de Gestion Holding
Onatra S.A.
Opatra

Pargelux
Paribas Asia Holding
Paribas Asia (1985) Ltd.
Paribas Bank International (Texas) Inc.
Paribas do Brazil
Paribas Europe
Paribas Finance, Inc.
Paribas Finance (Texas), Inc.
Paribas Finanziara Spa
Paribas Group Australia Pty, Ltd.
Paribas International
Paribas Investment Australia
Paribas North America, Inc.

Main subsidiaries of Paribas North America, Inc. include the following companies:

Paribas Corporation
Paribas Technology, Inc.
Paribas Asset Management Incorporated
Paribas Asset Management S.A.
Paribas International Bond Management
Paribas Futures
Paribas Properties

Paribas Participations B.V.
Paribas Paritcipations S.A.
Paribas Securities (Panama) Inc. c/o Arias Fabrega
Paribas South East Asia Ltd.
Paribas Suisse (Bahamas) Limited
Paribas Trust Co.
Paribas U.K. Holding Limited
Paribas U.S.A.
Paribaven
Poliet
Polydev
Prominco Holding

Quilter Goodison

Regie Immobiliere de la Ville de Paris
Robert Lefevre S.A.
Roegiers

SACI
SAGIP
Sait Electronics
Samaf
Soulnes-Chatillon
Scoa
Sedicecom
Segin Nord (Lille)
Sema-Metra
SFEEC
Smurfit Paribas Bank Ltd.
SNBE (Societe Noubvelle de Banque Europe)
Societe Anonyme de Gestion et d'Investissements et de Participations
Societe Anonyme de Transactions Internationales
Societe Auxiliaire de la Construction Immobiliere
Societe de Gestion d'Interets Petroliers
Societe de Participations Camerounaise
Societe de Participations Fincaires et Financieres Paribas "SPB-Paribas"
Societe de Participations Ivoirienne
Societe de Participations Techniques et Financiere
Societe de Recherche et de Financement
Societe des Ciments Francais
Societe d'Etudes Immobilieres et de Constructions
Societe d'Organisation, de Management et de Developpement pour les Industries Alimentaires et Agricoles
Societe Francaise de Sucreries au Chili
Societe Gabonaise de Participations
Societe Generale Commerciale et Financiere
Societe Generale de Financement Intercontinental
Societe Immobiliere Victoire
Societe Metalurgique de Gorcy
Societe Neo-Caledonienne de Developpement et de Participations

Societe Nouvellas Paribas International "SNPI"
Sococal
SOFIREAL
SOGEDIP
Ste Marocaine de Depots et de Credit
Sud Pacifique Miniere

Teleplastics Industries
Texaf Financiere Gestion
Transnucleaire

UFIBA
UGC Belgique
Union Financiere et Bancaire

Valeo
Valeurs et Rendements (Luxembourg)
Valex Petroleum, Inc.
Veninter
Vinton Oil and Gas Company

Supreme Court, U.S.
FILED
MAY 24 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1718

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

BANQUE DE PARIS ET DES PAYS-BAS,
Petitioner,

v.

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION

Of Counsel:
W. J. MCANELLY, JR.
EDWARD DE LA GARZA
Exxon Company, U.S.A.
800 Bell Street
Houston, Texas 77002

KEITH A. JONES*
FULBRIGHT & JAWORSKI
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-6800

J. RUFUS WALLINGFORD
C. MARK BAKER
FULBRIGHT & JAWORSKI
1301 McKinney Street
Houston, Texas 77010
(713) 651-5151

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

This diversity case is governed by Texas law. Because the Fifth Circuit's previous judgment did not take into account the intervening and conflicting decision in *Kerr Construction Co. v. Plains National Bank*, 753 S.W.2d 181 (Tex.App. —— Amarillo 1987, writ denied), this Court vacated and remanded with instructions to reconsider in light of that decision. 109 S. Ct. 299 (1988).

The question now presented is whether the Fifth Circuit properly followed those instructions on remand.*

---

* Respondent Exxon Company, U.S.A., is a division of Exxon Corporation. Exxon Corporation's affiliates and partially owned subsidiaries are listed in Appendix A, *infra*.

TABLE OF CONTENTS

	Page
STATEMENT	1
ARGUMENT	8
CONCLUSION	14

TABLE OF AUTHORITIES

CASES: Page

Aloe Coal Co. v. Clark Equipment Co., 816 F.2d 110 (3d Cir.), *cert. denied*, 484 U.S. 853 (1987) 13
BA Commercial Corp. v. Hynutek, Inc., 705 S.W.2d 713 (Tex. App. —— Dallas 1986, no writ) 4
Becker v. Interstate Properties, 569 F.2d 1203 (3d Cir. 1977), *cert. denied*, 436 U.S. 906 (1978) 12
Bernhardt v. Polygraphic Company, 350 U.S. 198 (1956) 12
Birmingham Fire Insurance Co. v. Winegardner & Hammons, Inc., 714 F.2d 548 (5th Cir. 1983) .. 10
Caranas v. Morgan Hosts-Harry Hines Boulevard, Inc., 460 S.W.2d 225 (Tex. Civ. App. —— Dallas 1970, no writ) 9
Commissioner v. Estate of Bosch, 387 U.S. 456 (1967) 11
East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986) 13
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 8, 10, 11, 13
Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940) 10, 11
Griffin v. McCoach, 313 U.S. 498 (1941) 4
Kerr Construction Co. v. Plains National Bank, 753 S.W.2d 181 (Tex. App. —— Amarillo 1987, writ denied) ..... *passim*
King v. Order of United Commercial Travelers, 333 U.S. 153 (1948) 12
McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657 (3d Cir.), *cert. denied*, 449 U.S. 976 (1980) .. 12
National Sur. Corp. v. Midland Bank, 551 F.2d 21 (3d Cir. 1977) 12
Republic National Bank v. Northwest National Bank, 578 S.W.2d 109 (Tex. 1978) 3, 4
Safeco Insurance Co. v. Wetherill, 622 F.2d 685 (3d Cir. 1980) 13

TABLE OF AUTHORITIES—Continued

Page

Six Companies of California v. Joint Highway Dist., 311 U.S. 180 (1940) 10
Southland Royalty Co. v. Pan American Petroleum Corp., 378 S.W.2d 50 (Tex. 1964) 9
Temple-Eastex, Inc. v. Addison Bank, 672 S.W.2d 793 (Tex. 1984) 3, 5, 8
West v. AT&T, 311 U.S. 223 (1940) 7, 10, 11
Witt v. Harlan, 66 Tex. 660, 2 S.W. 41 (Tex. 1886) 9

UNITED STATES CODE:

28 U.S.C. § 1332(a)(2) 3

RULES:

Texas Rule of Appellate Procedure 114 6

OTHER AUTHORITIES:

Almanac of the Federal Judiciary (1989) 3, 5

No. 89-1718

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BANQUE DE PARIS ET DES PAYS-BAS,
Petitioner,

v.

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION

STATEMENT

1. In 1981, respondent Exxon Company, U.S.A. ("Exxon"), and Houston Oil & Refining, Inc. ("Houston Oil"), entered into a contract to make reciprocal deliveries of crude oil. Exxon agreed to deliver 558,000 barrels of crude oil to Houston Oil during July, 1981, and Houston Oil agreed to deliver an equal quantity of crude oil to Exxon "*during* September through December 1981." Pet. App. G at 37 (emphasis in original). The contract required Houston Oil to provide an irrevocable standby letter of credit to cover the crude oil being delivered by Exxon. This was standard commercial practice; pursu-

ant to a letter of credit, an issuing bank undertakes to pay a beneficiary (here, Exxon) upon certification that the bank's customer (here, Houston Oil) has failed to perform an underlying contract.

Houston Oil applied to petitioner Banque de Paris et des Pay-Bas ("Paribas") to issue a letter of credit in the amount of $19,530,000. Paribas issued the requested letter of credit in return for a fee of $53,000. Pet. App. G at 37. A copy of the letter of credit was delivered to Exxon as the beneficiary. *Id.* at 38.

The letter of credit was payable only upon the presentation, *inter alia*, of a signed statement certifying that Houston Oil "*has failed to deliver* [the crude oil] *between September and December*, 1981." Pet. App. G at 37 (emphasis in original). That statement, however, was required to "be presented not later than October 31, 1981." *Id.* at 38. Paribas itself was aware of "the apparent inconsistency" in these terms, under which "the letter [of credit] expired *on October 31*, yet covered deliveries *between September and December*." *Id.* (emphasis in original). Yet "Paribas never sought to amend the letter to remove the contradiction or to notify Exxon." *Id.* at 47.

Exxon delivered 558,000 barrels of crude oil to Houston Oil in July, but Houston Oil never made the required reciprocal deliveries of crude oil to Exxon. "Exxon learned sometime in November that [Houston Oil] was going to default." Pet. App. G at 47. Exxon "presented the certification of . . . default to Paribas on November 30, 1981, and again on December 1, 1981. Paribas rejected both presentments as untimely." *Id.*

2. Exxon then instituted this action against Paribas in the 234th Judicial District Court of Harris County, Texas, to recover on the letter of credit. Paribas removed the case to the United States District Court for the Southern District of Texas, where jurisdiction rested

on 28 U.S.C. § 1332(a)(2). The case came before District Judge Hughes, who had been a Texas state court judge before his appointment to the federal bench. 1 *Almanac of the Federal Judiciary*, Fifth Circuit at 34-35 (1989).

Judge Hughes ruled for Exxon on cross-motions for summary judgment. The central problem in the case, the judge recognized, was that the terms of the letter of credit appeared to cancel one another and render performance impossible:

> Two provisions of the letter clash. The certification provision requires that in order to collect under the letter, Exxon must certify that [Houston Oil] failed to deliver the required volume of crude in September-December. On the other hand, the presentment clause requires the certification of nondelivery to be made by October 31, 1981. . . .
>
> . . . Obviously Exxon could not have certified on October 31 that [Houston Oil] had not delivered through the end of the following two months.

Pet. App. G at 47-48.

To resolve the parties' dispute over the meaning of these conflicting provisions, Judge Hughes invoked three rules of Texas law: (1) "letters of credit are subject to the same rules of construction that apply to ordinary contracts;" (2) "[i]nconsistencies must be resolved against the party who drew the contract;" and (3) "contracts must be construed to render performance possible." Pet. App. G at 47-48. The judge cited two decisions of the Texas Supreme Court—*Temple-Eastex, Inc. v. Addison Bank*, 672 S.W.2d 793, 798 (Tex. 1984), and *Republic National Bank v. Northwest National Bank*, 578 S.W.2d 109, 115 (Tex. 1978)—as authority for these well established rules.

Because Paribas was the party who drew the contract, and because Paribas' construction of the contract would

make it impossible for Exxon to make timely presentation for payment (and thereby would render illusory the undertaking for which Paribas had charged a fee), Judge Hughes concluded that these rules of Texas law dictated "[a] construction in favor of Exxon." Pet. App. G at 48. He held that the letter of credit must be read to give Exxon an opportunity to make presentation for payment upon Houston Oil's failure to deliver within the period specified in the certification provision. This conclusion, the judge noted, was supported by the result in *BA Commercial Corp. v. Hynutek, Inc.*, 705 S.W.2d 713 (Tex.App. —— Dallas 1986, no writ), which had decided the same issue in the context of a letter of guaranty. *Id.*

3. A divided panel of the Fifth Circuit reversed. Paribas incorrectly states that the panel majority "drew heavily on well-established principles of Texas letter of credit law," Pet. 3, and "focused upon and analyzed the key decisions of the highest state court." Pet. 7. The majority's opinion did "not rest its conclusions upon its appraisal of Texas law or Texas decisions." *Griffin v. McCoach*, 313 U.S. 498, 503 (1941). Although the majority formally made reference to the Texas version of the Uniform Commercial Code, its only acknowledgments of Texas decisional law consisted of citations to *Republic National Bank* and *Hynutek* for propositions unrelated to the central merits of the case. *See* Pet. App. G at 41 n.7, 42 n.15, 43 n.18.

Instead of making a conscientious effort to apply Texas law, as Judge Hughes had done, the panel majority ignored the Texas rule that letters of credit are construed like other contracts. Instead, the majority reasoned that letters of credit are different from other contracts and must be construed with solicitude for the commercial interests of the issuing bank. Citing a diverse body of non-Texas decisional law and legal treatises, handbooks, and other non-Texas authorities (none of which was

directly on point), the majority reversed, holding that "the obligation of the issuing bank had terminated even though it might not have been possible to present to the bank the documents required for payment before the expiry date." Pet. App. G at 36.

Judge Garza, who was the only Texas lawyer on the panel, *see* 2 *Almanac of the Federal Judiciary*, Fifth Circuit at 16-17, dissented on the ground that the panel majority had failed to follow Texas law:

> The majority, focusing on the expiry date and nothing else, in effect makes the letter of credit involved in this case a nullity. . . .
>
> I am convinced that the Texas judge sitting on the court below, interpreting the letter of credit under Texas law, was correct.

Pet. App. G at 45-46.

4. Shortly thereafter, the Court of Appeals for the Seventh District of Texas at Amarillo had occasion to consider the same issue in *Kerr Construction Co. v. Plains National Bank*, 753 S.W.2d 181 (Tex.App. —— Amarillo 1987, writ denied). The Texas court's opinion was not, as Paribas now claims, "unreasoned." Pet. 6.

Like Judge Hughes in this case, the Texas court began by citing *Temple-Eastex* for the "well settled" precept that in Texas "rules of construction for ordinary contracts govern letters of credit." 753 S.W.2d at 184. Applying traditional maxims of construction, which the court supported with citations to other Texas decisions, the court held, also like Judge Hughes, that a letter of credit with inconsistent terms relating to certification and expiration must be construed to give the beneficiary an opportunity to make presentation for payment upon the failure of the bank's customer to perform the underlying contract within the period specified in the certification provision.

5. Exxon called *Kerr Construction* to the attention of the Fifth Circuit in motions for recall of mandate and for leave to file a second suggestion for rehearing *en banc*, but those motions were denied. Pet. App. J and K. This Court then granted certiorari and subsequently vacated and remanded for further consideration in light of *Kerr Construction*. 109 S. Ct. 299 (1988).

6. On remand, the panel majority initially professed itself "unable to determine whether *Kerr* correctly states Texas state law, and if it does, how that decision affects the issues here presented." Pet. App. D at 26. Accordingly, the court certified the controlling issue of law to the Texas Supreme Court pursuant to Texas Rule of Appellate Procedure 114. *Id.* at 22. *See also* Pet. App. C.

Judge Garza dissented, observing that although *Kerr Construction* "is virtually indistinguishable on the relevant facts from the case sub judice . . . , my brothers from Louisiana and Mississippi continue to resist the application of controlling Texas precedent." Pet. App. D at 27. Judge Garza believed that *Kerr Construction* was correct as a matter of Texas law, and he pointed out that "the Texas Supreme Court denied writ in the very case [*Kerr Construction*] that answered the question presented for certification." *Id.* at 28.

7. The Texas Supreme Court, which as Judge Garza stated had denied review in *Kerr Construction*, likewise declined to accept certification in this case. The court explained that the narrow question of state law that the Fifth Circuit had certified "was dependent upon issues of fact." Pet. App. B.

8. The Fifth Circuit thereupon undertook to reconsider this case in light of *Kerr Construction*. The court began its analysis with the rebuttable presumption that *Kerr Construction* had been correctly decided as a matter of Texas law:

> A federal court sitting in diversity is bound to follow decisions of the state's intermediate appellate

> courts unless it is "convinced by other persuasive data that the highest court of the state would decide otherwise." There is, therefore, a working presumption that state intermediate appellate court decisions represent accurate statements of state law.

Pet. App. A at 3, quoting *West v. AT&T*, 311 U.S. 223, 237 (1940).

The court then proceeded to consider and reject on the merits each of Paribas' arguments concerning why *Kerr Construction* should not be considered good Texas law. In particular, the court noted that "although Paribas argues that *Kerr* is incompatible with several cited Texas Supreme Court cases, these cases bear only tangentially on the issue raised in *Kerr*." Pet. App. A at 5 (footnote omitted). The court additionally noted that "[t]he reasons that the Texas Supreme Court gave for refusing to accept certification of the question that we posed to it lends further support to the conclusion that *Kerr* is not to be disregarded. Were *Kerr* not authoritative, the resolution of this case would not turn solely upon 'issues of fact.'" *Id.*

The Fifth Circuit recognized that the crucial difference between *Kerr Construction* and its own earlier decision in this case was the application by the Texas court of the rule that letters of credit are governed by the same maxims of construction as ordinary contacts. Pet. App. A at 7. Applying that rule of Texas law, the Fifth Circuit concluded that the "interpretive maxims [of construction] applied in *Kerr* . . . compel the conclusion that the date fixed in the certification provision controls over the expiration date." *Id.* at 8.

The court considered whether "any of the distinctive facts of this case implicate maxims of construction that were not implicated in *Kerr* and that would compel a different interpretation of Paribas' letter of credit." Pet. App. A at 8. But the court concluded that "Paribas has not brought any such maxim of construction to our at-

tention, and we have been unable to think of one." *Id.* Upon reconsideration, therefore, the court affirmed the district court's judgment in favor of Exxon.

ARGUMENT

As the foregoing statement demonstrates, Paribas' petition for a writ of certiorari is based upon a false premise. The Fifth Circuit's opinion on remand does not express, adhere to, or reflect a "deeply-entrenched policy . . . of virtually complete and inflexible deference to the holdings of state intermediate appellate courts." Pet. i. To the contrary, the Fifth Circuit carefully evaluated *Kerr Construction* in light of the other Texas authorities that were brought to its attention. The court then determined, with an admirable degree of intellectual integrity, that *Kerr Construction* was correct as a matter of Texas law and that its own earlier opinion had been incorrect. That determination raises no issue warranting review by this Court.

1. The Fifth Circuit correctly recognized that *Kerr Construction* turned on the proposition that letters of credit are subject to the same rules of construction as other contracts. Pet. App. A at 7. As authority for that proposition, the Texas court in *Kerr Construction* (like Judge Hughes in this case) had cited the decision of the Texas Supreme Court in *Temple-Eastex*. In the latter case, the Texas Supreme Court had stated, in language that could hardly be clearer, "[l]etters of credit are governed by the construction rules of ordinary contracts." 672 S.W.2d at 798. Once the Fifth Circuit had accepted that proposition, as it was bound to do under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the outcome of this case was a foregone conclusion.

The Texas court in *Kerr Construction* had decided that case by applying two maxims of construction, each of which was solidly grounded in Texas precedent. *First*, the court noted that under Texas law "where there is an

irreconcilable conflict between different parts or provisions of an instrument and the first part or provision is definite and certain and irreconcilable with later parts or provisions the first part or provision must prevail." 753 S.W.2d at 184. The Texas Supreme Court has expressly endorsed this "rule which gives effect to an earlier over a later provision." *Southland Royalty Co. v. Pan American Petroleum Corp.*, 378 S.W.2d 50, 57 (Tex. 1964). This rule, in fact, is practically as old as the Texas Supreme Court itself. *See Witt v. Harlan*, 66 Tex. 660, 2 S.W. 41, 42 (1886). Because in this case, as in *Kerr Construction*, the certification provision preceded the expiry date in the letter of credit, the certification provision was controlling.

Second, the court in *Kerr Construction* reasoned that "when there is an irreconcilable conflict between provisions in an agreement, the provision which contributes most essentially to the agreement is entitled to the most consideration." 753 S.W.2d at 184. This also is hornbook law in Texas: "If a variance exists between two clauses in the instrument, . . . the clause which contributes most essentially to the agreement is the one that is entitled to the greater consideration." *Caranas v. Morgan Hosts-Harry Hines Boulevard, Inc.*, 460 S.W.2d 225, 228 (Tex. Civ. App. —— Dallas 1970, no writ), quoting 13 Tex. Jur. 2d *Contracts* § 142 at 323. As the Fifth Circuit correctly recognized, "the certification provision, because it states a condition precedent to the bank's liability, is more 'essential' to the contract as a whole than is the [expiry date]." Pet. App. A at 8.

In short, the Fifth Circuit did not, as Paribas claims, "mechanically defer[]" to *Kerr Construction*. *See* Pet. 6. The court conscientiously identified the rules of Texas law that had been applied in *Kerr Construction*. Then, after determining that no other cited Texas Supreme Court cases and no other maxims of construction pointed in a different direction, the court applied the rules of Texas law identified in *Kerr Construction* to the facts of

this case. That is precisely what the court was supposed to do under *Erie*.

2. Paribas incorrectly contends that the Fifth Circuit applied the wrong standard in determining whether *Kerr Construction* represents good Texas law. Pet. 8-10. To the contrary, the Fifth Circuit quoted from and applied the very standard that was articulated by this Court in *West v. AT&T*, 311 U.S. 233, 237 (1940): the decision of a state intermediate appellate court on an issue of state law "is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *See* Pet. App. A at 3. As this Court explained in *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177-78 (1940), "[a]n intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question." *See also, e.g., Six Companies of California v. Joint Highway Dist.*, 311 U.S. 180, 188 (1940).

Although Paribas appears to argue that in other cases the Fifth Circuit has applied a more deferential standard than that articulated by this Court in such cases as *West* and *Fidelity Union*, that argument is both wrong and irrelevant. It is wrong, for those other cases do not reflect the "unchallengeable deference," Pet. 8, that Paribas alleges. As is indicated by the very quotation from *Birmingham Fire Insurance Co. v. Winegardner & Hammons, Inc.*, 714 F.2d 548, 550 (5th Cir. 1983), upon which Paribas relies, when confronted with decisions of a state intermediate appellate court the Fifth Circuit remains open to persuasion that "the supreme court of the state would hold differently." *See* Pet. 8. By granting a rebuttable presumption of correctness to such decisions, the Fifth Circuit is acting squarely in line with this Court's own pronouncements.

Paribas' argument also is irrelevant. The Fifth Circuit in this case did not even cite, much less rely upon, the earlier decisions that Paribas criticizes. On petition for a writ of certiorari, the opinion of the lower court must be evaluated on its own merits. Whatever might be said about other decisions of the Fifth Circuit, this case was correctly decided.

3. Paribas incorrectly claims to have identified an internal conflict in this Court's own pronouncements concerning the weight to be given the decision of a state intermediate appellate court. *See* Pet. 10-12. In suggesting that such cases as *West* and *Fidelity Union* have been eroded or superseded by *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967), Paribas has simply misread *Bosch*.

Bosch was not a diversity case controlled by *Erie*. Neither was it a case that called upon a federal court to determine whether a state intermediate appellate court had correctly decided a matter of state law. The question in *Bosch* was "[w]hether a federal court or agency in a federal estate tax controversy is conclusively bound by a state trial court adjudication of property rights or characterization of property interests when the United States is not made a party to such proceeding." 387 U.S. at 456-57. This question was decided by reference to the intent of Congress in enacting the relevant provisions of the federal estate tax. Relying upon the fact that "the Senate Finance Committee . . . said that 'proper regard,' not finality, 'should be given to interpretations of the will' by state courts . . . ,'" *id.* at 464, the Court held that "federal authorities are not bound by the determination made of such property interest by a state trial court." *Id.* at 457. But while reaching this conclusion, the Court quoted with approval the very passage from *West* that the Fifth Circuit quoted and followed in this case. *See id.* at 465. Paribas' suggestion that *Bosch* silently overruled *West*, therefore, is plainly incorrect.

The other two cases cited by Paribas are equally far afield. In *King v. Order of United Commercial Travelers*, 333 U.S. 153, 160 (1948), the Court was concerned with the effect to be given to the decision of a state trial court that was " 'binding only upon the parties who are before the Court in that particular case and would not constitute a precedent in any other case in that Court or in any other court in the State.' " This Court held that while such a decision could be "properly attributed some weight," it was "not controlling." *Id.* at 160-61. But in so holding, the Court reaffirmed that "federal courts are bound by decisions of a state's intermediate appellate courts unless there is persuasive evidence that the highest state court would rule otherwise." *Id.* at 158. In the second case, *Bernhardt v. Polygraphic Company*, 350 U.S. 198 (1956), the Court simply followed a decision of the Vermont Supreme Court on a question of Vermont law. Neither of these cases supports Paribas' suggestion of an internal conflict in the jurisprudence of this Court.

4. Finally, Paribas urges that the decision below conflicts with *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657 (3d Cir.), *cert. denied*, 449 U.S. 976 (1980), and other decisions by the Third Circuit. That asserted conflict is purely imaginary. Whereas in this case the Fifth Circuit was concerned with the weight to be given to a state intermediate appellate decision that was directly on point, in *McKenna* there was no state court decision—trial or appellate—that "specifically address[ed] or definitively resolve[d] the question at issue." *Id.* at 662 n.23. This also was true in two of the other Third Circuit cases cited by Paribas. *See Becker v. Interstate Properties*, 569 F.2d 1203, 1205 (3d Cir. 1977) ("no [state] cases are squarely on point"), *cert. denied*, 436 U.S. 906 (1978); *National Sur. Corp. v. Midland Bank*, 551 F.2d 21, 27 (3d Cir. 1977) ("no holdings by the courts of New Jersey involving the issue are presented here"). In such cases, where no clear direc-

tion has been provided by state decisional law, the Third Circuit has set forth general observations concerning how a federal court should go about deciding a question of state law. *See* Pet. 13. Those general observations are not inconsistent with the decision below.

In two other cases cited by Paribas, the Third Circuit did choose not to follow a decision by a state intermediate appellate court. But each of those cases is *sui generis*. In *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110 (3d Cir.), *cert. denied*, 484 U.S. 853 (1987), the state intermediate appellate court had followed the reasoning of an earlier Third Circuit decision; the reasoning of that decision, however, subsequently had been rejected as "unsatisfactory" by this Court in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 870 (1986); the Third Circuit "conclude[d] that the United States Supreme Court's analysis is so persuasive that it will be followed by Pennsylvania courts." 816 F.2d at 117. In *Safeco Insurance Co. v. Wetherill*, 622 F.2d 685, 690-91 (3d Cir. 1980), the decision of the state intermediate appellate court appeared to be in direct conflict with a prior *per curiam* affirmance rendered in an unreported decision by the same court sitting *en banc*; the Third Circuit believed that "[u]nder these circumstances, we must make an independent judgment as to what the decision of the highest court in Pennsylvania would be;" following a careful review of state authorities the Third Circuit decided that the *en banc* court had been right, and the panel wrong, as a matter of state law. These decisions obviously afford no basis for the assertion of a conflict between the Third and Fifth Circuits.

Ever since *Erie* was handed down more than fifty years ago, federal courts have been going about the task of deciding questions of state law. In doing so, they often have been required to determine what that law is. And they frequently have described the way they go about making that determination. It is to be expected

that different courts, and even different panels of the same court, will use different verbal formulations in describing what is essentially the same intellectual process. This does not mean that there is genuine disagreement about what that process entails. There is no reason to believe, for example, that the Third Circuit would have concluded, in the face of overwhelming evidence to the contrary, that *Kerr Construction* had been wrongly decided under Texas law. The conflict that Paribas asserts simply does not exist.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submiited,

Of Counsel:
W. J. McANELLY, JR.
EDWARD DE LA GARZA
Exxon Company, U.S.A.
800 Bell Street
Houston, Texas 77002

KEITH A. JONES*
FULBRIGHT & JAWORSKI
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-6800

J. RUFUS WALLINGFORD
C. MARK BAKER
FULBRIGHT & JAWORSKI
1301 McKinney Street
Houston, Texas 77010
(713) 651-5151

* Counsel of Record

APPENDIX

APPENDIX A

The following is a list of Exxon Corporation's affiliates and partially owned subsidiaries: *

AT&S Exploration Ltd.
Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.
Aditivos Orinoco, C. A.
Adria-Wien Pipeline Gesellschaft mit beschrankter Haftung
Aircraft Fuel Supply B. V.
Aishin Sekiyu K. K.
Alberta Products Pipe Line Ltd.
Al-Jubail Petrochemical Company
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Arabian American Oil Company
Aramco Overseas Company
Aramco Services Company
Aromatics (Thailand) Company Limited, The
Asakawa Sekiyu K.K.
Atlas Supply Company
Atlas Supply Company of Canada Limited
Australian Synthetic Rubber Company Limited
Aviation Services Saudi Arabia Limited
Awaji Gas Nenryo Kabushiki Kaisha
Azuma Sekiyu K.K.
BEB Erdgas und Erdoel GmbH, Hannover
BT Asia Securities Limited
B.W.O.C., Inc.
Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K. K.
Bayerische Erdgasleitung G.m.b.H.
Beaverhill Resources Limited
Bel-Air Entreposage S. A.

* This list does not include companies in which Exxon Corporation owns less than five percent of the stock.

BRIGITTA Erdgas und Erdoel GmbH, Hannover
Bryan Woodbine Gathering Inc.
Byron Creek Collieries (1983) Limited
Canadian Reserve Oil & Gas Ltd.
Carlew Inc.
Carnduff Gas Limited
Cary Chemicals Inc.
Castle Peak Power Company Limited
Champlain Oil Products Limited
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chinchaga Resources Limited
Chuo Sekiyu Hanbai K.K.
Clermont Coal Mines Limited
Comcor Chemicals Limited
Commercial Polymers Pty. Ltd.
Cynthia Gas Gathering Company Limited
Compania Minera Disputada de Las Condes S.A.
Comptoir Auxiliaire du Petrole
Comptoir Oxonnaxien des Combustibles (C.O.C.)
Computer Centrum Groningen B.V.
DFTG Deutsche Fluessigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.
Daiichi Kouyu K. K.
Demulsificantes Del Orinoco, C.A.
Depot Petrolier du Gresivaudan
Depots de Petrole Cotiers
Depots Petrolier de la Corse
Deudan-Holding GmbH
Deutsche Erdgas Transport G.m.b.H.
Deutsche Transalpine Oelleitung G.m.b.H.
Devon Estates Limited
Divafi Pty. Limited
Dixie Pipeline Company
Dukhan Service Company
E S F Limited
Eagle Kenso K.K.
East Texas Salt Water Disposal Company
Eastcoast spill Response Inc.

Eiko Sekiyu K.K.
Elwerath Erdgas und Erdoel GmbH, Hannover
Elwerath Erdoel und Erdgas AG
Emirates Chemicals Company
Emori Sekiyu K.K.
Emsland-Erdoelleitung G.m.b.H.
Energie Marketing Service GmbH (EMS)
Entrepot Petrolier de l'Aveyron (E.P.A.)
Entrepot Petrolier de Mulhouse (E.P.M.)
Erdgas-Verkaufs-Gesellschaft m.b.H.
Esso Chemical Alberta Limited
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc.
Esso Malaysia Berhad
Esso of Canada Limited
Esso Resources Canada Limited
Esso Resources Enterprises Ltd.
Esso Resources N.W.T. Limited
Esso Resources (1989) Ltd.
Esso Resources Properties Inc.
Esso Resources Ventures Limited
Esso Societe Anonyme Francaise
Esso Standard Tunisie S. A.
Establissements Cloarec
Exact Reisebyra A/S
Exxon Chemical Pakistan Limited
489061 Ontario Inc.
F. T. Giken Kabushiki Kaisha
Federated Pipe Lines Ltd.
Ferngas Nordbayern G.m.b.H.
Ferngas Salzgitter GmbH
Forjas de Colombia, S. A.
Fuji Kogyo K.K.
Gasunie Engineering B.V.
General Bussan K.K.
General Highway K.K.
General Petrochemical Industries Limited
General Sekiyu K.K.
General Sekiyu Okinawa Hanbai K.K.

General Sekiyu Overseas Ltd.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha
Geobutane—Lavera
Gewerkschaft Brassert Erdoel und Erdgas GmbH
Gewerkschaft Erdoel-Raffinerie Deurag-Nerag
Gewerkschaft Gute Hoffnung Erdgas und Erdoel GmbH
Gewerkschaft Kuchenberg Erdgas under Erdoel GmbH
Glen Park Gas Pipe Line Company Limited
Goroku Sekiyu K.K.
Grande Ecaille Land Company, Inc.
Great Eastern Oil Limited
Groupement Immobilier Petrolier
Groupement Liants Routiers du Gard Esso-Viafrance (G.L.R.G.E.V.)
Groupement Petrolier Aviation
Groupement Petrolier de la Cote D'Azur
Groupement Petrolier de Nantes
Groupement Petrolier du Finistere G.I.E.
Hamburger Gaswerke GmbH
Hannoversche Erdoelleitung G.m.b.H.
Hanshin Kyowa Sekiyu K.K.
Hayakawa Sekiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten Kabushiki Kaisha
Hoei Sekiyu K.K.
Hokushin Bussan K.K.
Hokuyu Sekiyu K. K.
Home Energy Company Ltd.
Home Oil Company Limited
Hong Kong Pumped Storage Development Company, Limited
Houston Regional Monitoring Corporation
Hydranten-Betriebsgesellschaft
Hydrierwerke Paelitz Aktiengesellschaft
Imperial Oil Limited
Imperial Pipe Line Company, Limited, The
Inada Ekka Gas Kabushiki Kaisha

Industria Acqua Siracusana S.p.A.
Industry Promotion Enterprises Limited
Intamix Corporation
Interhome Energy Inc.
Interprovincial Pipe Line (Alberta) Ltd.
Interprovincial Pipe Line (NW) Ltd.
Intoplane Service Company Limited
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions, Limited
Japan Butyl Company Limited
Japan Coal Liquefaction Development Company, Ltd.
Jersey Nuclear-Avco Isotopes, Inc.
K.K. Aizu General
K.K. Daimaru
K.K. General Sekiyu Hanbaisho
K.K. Genetech
K.K. Heian Sekiyu
K.K. Ito Sekiyuten
K.K. Kanagawa Sekiyu Shokai
K.K. Kyoei Agency
K.K. Kyoei Shosha
K.K. Kyowa Sekiyu Service
K.K. Marugo Izumasa Shoten
K.K. Marutaka Sekiyu
K.K. Momose Sekiyu
K.K. Nippatsu
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toresen
K.K. Uwano Sekiyu Shokai
K/S Statfjord Transport A/S & Co.
Kabushiki Kaisha Sankyo Plastics
Kai Tak Refuellers Company Limited
Kanto Kygnus Sekiyu Hambai K.K.
Karlsruhe-Stuttgart Rohrleitung Gesellschaft mbH
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha

Keihan Sekiyu K.K.
Keiyo Sekiyu Hanbai K.K.
Kenya Petroleum Refineries Limited
Kibo Sekiyu Hanbai K.K.
Kimura Sekiyu Kabushiki Kaisha
Kinwa Sekiyu K.K.
Kobe Standard Sekiyu K. K.
Kowa Sekiyu K.K.
Kowloon Electricity Supply Company Limited
Kumho E.P. Rubber Co., Ltd.
Kygnus Ekka Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Marketing Service K.K.
Kygnus Sekiyu K. K.
Kyushu Eagle K.K.
LPL Investments, Inc.
La Societe Acadienne de Recherches Petrolieres SAREP
Lakehead Pipe Line Company, Inc.
LEAG Aktiengesellschaft feur luzernisches Erdoel
Les Docks des Petroles d'Ambes
Long Beach Oil Development Company
Maasvlakte Coal Terminal B.V.
Maasvlakte Olie Terminal N.V.
Magota Sekiyu K.K.
Mainline Pipelines Limited
Manito Pipelines Ltd.
Maple Leaf Petroleum Limited
Marugo Gas K.K.
McColl-Frontenac Inc.
McColl-Frontenac Oil Co. Ltd.
MEGAL FINCO
MEGAL GmbH
Meiji Sekiyu K.K.
MESBIC Financial Corporation of Houston
Metro Fuel Co. Ltd.
Mikawa Bussan K.K.
Minerals Limited

Mittelrheinische Erdgas Transport Gesellschaft mit beschreankter Haftung
Montreal Pipe Line Limited / Les Pipe-Lines Montreal Limitee
Mount Hanikris Limited
Mount Thorley Coal Loading Limited
Mr. Lube Canada Inc.
Mytex Polymers Incorporated
NAM—K 7 B.V.
NAM—K 14 B.V.
NAM—K 15 B.V.
NAM/CLOMS—K 8/K 11 B.V.
NAM/CLOMS—L 13 B.V.
NPC Services, Inc.
N. V. Nederlandse Gasunie
Nakabayashi Sekiyu K.K.
Nansei Oil Terminal K.K.
Nansei Sekiyu Kabushiki Kaisha
Nanseki Kaihatsu K.K.
Native Venture Capital Co. Ltd.
Near East Development Corporation
Nederlandse Aardolie Maatschappij B. V.
Neptune Bulk Terminals (Canada) Ltd.
Nichimo Oil (Bermuda) Co., Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nisku Products Pipe Line Company Limited
Nissei Sekiyu Kabushiki Kaisha
Norddeutsche Erdgas-Aufbereitungs G.m.b.H.
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Nordrheinische Erdgas Transport Gesellschaft mit beschrankter Haftung
Noroxo
Northward Developments Ltd.
Nottingham Gas Limited
107580 Canada Inc.
151742 Canada Inc.

159129 Canada Inc.
160440 Canada Limited
160837 Canada Limited
165548 Canada Limited
165549 Canada Limited
165550 Canada Limited
165899 Canada Limited
Office Prive d'Assurances et de Courtages
Offshore Medical Support Limited
Oil Field Chemicals Company (Saudi Arabia) Ltd.
Oil Service Company of Iran (Private Company)
Oil Spill Response Limited
Oil Transport Company (Saudi Arabia) Limited
Oilship Limited
Oldenburgische Erdoel Gesellschaft m.b.H.
Osaka Ashyu Nenryou K.K.
Osaka Propane Gas Hambai Kabushiki Kaisha
Osaka Sekiyu Gas Yuso K. K.
P.A.C. S.A.R.L. (Pinson Allegret-Causse)
P. T. Stanvac Indonesia
Pars Investment Corporation
Peninsula Electric Power Company Limited
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petrosvibri S.A.
Pipe Line Services, Inc.
Plantation Pipe Line Company
Portland Pipe Line Corporation
Primaer Oel GmbH
Progas A/S
Progas Limited
Raffinerie du Midi S.A.R.L.
Rainbow Pipe Line Company, Ltd.
Redwater Water Disposal Company Limited
Refineria Petrolera Acajutla, S.A.
Rheingas Erdgasleitungs-Gesellschaft m.b.H.
Rochevert Inc.
Rotterdam Antwerpen Pijpleiding (Belgie)

Rotterdam-Antwerpen Pijpleiding (Nederland) N.V.
Rhurgas Aktiengesellschaft
S.A. du Pipeline a Produits sur Territoire Genevois (SAPPRO)
S.A.R.L. Viain
S.O.P.—Societa Oleodotti Padani S. p. A.
Saitma Sekiyu Hanbai K.K.
Sakurajima Futo K.K.
Sanyo Sekiyu K.K.
Saraco S. A.
Saudi Arabian Lube Additives Company Limited
Schubert KG
Scurry-Rainbow Oil Limited
SEAG Aktiengesellschaft fuer schweizerisches Erdoel
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
Seismic Industries A/S
Senpoku Oil Service K.K.
SERAM Societa per Azioni
Servacar Ltd.
Shehtah Drilling Limited
Shimoyama Sekiyu K.K.
Shin-Nihon Yukagaku Kogyo K.K.
Shinohara Oil K.K.
Shizuoka Kanesho Hambai Kabushiki Kaisha
Smiley Gas Conservation Limited
Sociedad Anonima "Escuela Campo Alegre"
Sociedad de Inversiones de Aviacion
Sociedad Nacional de Oleoductos Ltda.
Societa Italiana per l'Oleodotto Transalpino S.p.A.
Societa per Azioni Raffineria Padana Olii Minerali-SARPOM
Societe Anonyme de Gestion de Stocks de Securite (SAGESS)
Societe Anonyme de la Raffinerie des Antilles
Societe Anonyme des Hydrocarbures
Societe Anonyme "Produits Lubrifiants de Madagascar" —PROLUMA S.A.
Societe Civile de Mustapha Algerie

Societe Civile de Participation pour la Destruction des Dechets Industriels (SOCDI) Immobiliere "Courcelles-Etoile"
Societe Civile Immobiliere Khariessa
Societe Civile Immobiliere "Kleber-Etoile"
Societe Civile Immobiliere "Les Casseaux-Bougainville"
Societe de la Raffinerie d'Alger
Societe de Manutention de Carburants Aviation
Societe de Manutention de Carburants Aviation Dakar-Yoff, S. A.
Societe de Promotion et de Financement Touristique (CARTHAGO)
Societe d'Entreposage de San-Pedro
Societe des Pipe-Lines de Strasbourg
Societe des Transports Petroliers par Pipe Line
Societe d'Etude et d'Exploitation de la Raffinerie du Tchad—S.E.E.R.A.T.
Societe d'Exploitation & de Development d'Operations Commerciales
Societe du Caoutchouc Butyl (SOCABU)
Societe du Pipe Line de la Raffinerie de Lorraine
Societe du Pipe-Line Mediterranee-Rhone
Societe du Pipeline Sud-Europeen
Societe Esso de Recherches et d'Exploitation Petrolieres Esso Rep
Societe Francaise Exxon Chemical
Societe "Geomines-Caen"
Societe Havraise de Manutention de Produits Petroliers
Societe Hoteliere de la Petite Campagne
Societe Immobiliere Paris-Niel
Societe Ivoirienne d'Operations Petrolieres S.A.
Societe Malgache de Raffinage
Societe Reunionnaise d'Entreposage
Socony-Standard-Vacuum Oil Company (Petroleum Maatschappij)
Southern Natural Gas Development Pty. Ltd.
Standard Kosan Kabushiki Kaisha
Standard Service K.K.

Stratfjord Transport A/S
Stockage Geologique de Gaz de Lavera
Sueddeutsche Erdgas Transport Gesellschaft mit beschraenkter Haftung
Sun East Company Ltd.
Syncrude Canada Ltd.
Synergistics Industries Limited
204383 Enterprises Limited
363011 Alberta Limited
369772 Alberta Inc.
393193 Alberta Inc.
TAR-Tankanlage Rumlang AG
TBN Tanklager-Betriebsgesellschaft Nurnberg mbH
TGF Tankdienst Gesellschaft Frankfurt
TGM Tankdienst Gesellschaft Munchen
Taglu Enterprises Ltd.
Taihei Bussan K.K.
Taiko Sekiyu K.K.
Taisei Kogyo Sekiyu Hanbai K.K.
Takahama Kosan Kabushiki Kaisha
Taketsuru Yugyo K.K.
Tanaka Sekiyu Hanbai K.K.
Tankanlage A. G., Mellingen
Tanklager Altishausen A.G.
Tanklager Gesellschaft, Koln
Tanklager-Gesellschaft Tegel
Tanklager Lechelles I S.A.
Tanklager Taegerschen AG
Tecnica Quimica Petrolera, S.A. de C. V.
Tecumseh Gas Storage Limited
Texaco Canada Malaysia Inc.
Thai Aliphatics Company Limited
THUMS Long Beach Company
Thyssengas G.m.b.H.
TIBA Speditions GmbH
Toa Nenryo Koygo Kabushiki Kaisha
Tohko Plastics Company, Limited
Tohpren Co. Ltd.

Toko Sekiyu K.K.
Tonen Energy and Marine (Singapore) Pte. Ltd.
Tonen Energy International Corp.
Tonen Maintenance K.K.
Tonen Properties Inc.
Tonen Sekiyukagaku Kabushiki Kaisha
Tonen System Plaza Kabushiki Kaisha
Tonen System Service Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Technology K. K.
Tonex Company Limited
Tophus Quen Pty. Ltd.
Towa Compounding Co. Ltd.
Towa Sekiyu K.K.
Toyoshina Film Company, Ltd.
Transalpine Oelleitung in Oesterreich Gesellschaft m.b.H.
Trans-Arabian Pipe Line Company
Trans-Northern Pipelines Inc.
Transgaz Lavera
Trimin Resources Inc.
Tsurumaru Unyu K.K.
Turkish Petroleum Company, Limited
UBAG - Unterflurbetankungsanlage Flughafen Zurich
Ulan Coal Mines Limited
Ulan Coal Shippers Pty. Limited
United Industry Development Co., Ltd.
United Collieries Pty. Limited
Van Salt Water Disposal Company
W.A.G. Pipeline Proprietary Limited
Wako Jushi Kabushiki Kaisha
Wako Kasei Kabushiki Kaisha
Wartempomp Nederland B.V.
Westdeutsche Erdoelleitungs-G.m.b.H.
Westgas G.m.b.H.
Westgastransport B.V.
Winnepeg Pipe Line Company Limited
Worex S.N.C.
Yasaka Sekiyu K.K.

Yellowstone Pipe Line Company
Yoshiki Sekiyu Kabushiki Kaisha
Yoshimi Gas Kabushiki Kaisha
Yuai Sekiyu K.K.
Yugen Kaisha Nishi Kobe Bosai Center

MOTION FILED
JUN 4 1990

No. 89-1718

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BANQUE DE PARIS ET DES PAYS-BAS,
Petitioner,

v.

EXXON COMPANY, U.S.A.,
Respondent.

On Petition for Writ of Certiorari to the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AS AMICUS CURIAE OF AMERICAN BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

JOHN J. GILL III
General Counsel
Counsel of Record

MICHAEL F. CROTTY
Deputy General Counsel
for Litigation

AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5026

Attorneys for Amicus Curiae

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1718

BANQUE DE PARIS ET DES PAYS-BAS,

Petitioner,

v.

EXXON COMPANY, U.S.A.,

Respondent.

On Petition for Writ of Certiorari to the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

In accordance with the provisions of Rule 37.2 of the Supreme Court Rules, the American Bankers Association hereby respectfully moves for leave to file a brief as amicus curiae in support of the Petitioner. Counsel for the Petitioner has consented to this filing; counsel for Respondent has ignored a written request for consent.

The American Bankers Association, as representative of the commercial banking industry at large has a distinct interest in preserving the smooth operation of the letter of credit aspect of our business. In furtherance of that interest, the Association appeared as amicus curiae in this case in the Fifth Cir-

cuit, and also appeared as amicus curiae in *Kerr Construction Company v. Plains National Bank*, 753 S.W. 2d 181 (Tex. App.-Amarillo 1987, writ denied). The applicability of the latter decision as binding precedent upon the Fifth Circuit here is a principal issue for which Banque Paribas seeks certiorari.

The *Kerr* decision represents a serious threat to letters of credit operations of commercial banks. That device is primarily, though not exclusively, used in interstate and international transactions, and, as such, it is critical that uniform rules be applied to such transactions. *Kerr* is at odds with the way letter of credit law is interpreted and applied elsewhere. If that case fairly represented the law of Texas (which it does not), we would have to concede that Texas may do what it wishes to its own intrastate commerce. But it cannot apply aberrant rules in such a fashion as to impede interstate commerce. The Fifth Circuit's mechanical obeisance to *Kerr* authorizes exactly that kind of impediment, however, as we propose to show in the attached brief as amicus curiae.

We respectfully submit that this added perspective on the Fifth Circuit's decision here may materially assist the Court in determining whether to grant the petition.

Respectfully submitted,

JOHN J. GILL
General Counsel

MICHAEL F. CROTTY
Deputy General Counsel
for Litigation

AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5026

Attorneys for Amicus Curiae

QUESTION PRESENTED

Whether the *Erie* doctrine requires federal courts, sitting in diversity cases, to adhere to interpretations of state law by state intermediate appellate courts, developed in the context of a purely local transaction, and apply those interpretations automatically to interstate transactions in disregard of any undue burden upon interstate commerce that might entail.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	13

TABLE OF AUTHORITIES

CASES:	Page
Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959)	7
City National Bank v. Westland Towers Apartments, 152 Mich. App. 136 (1986)	6
Consolidated Aluminum Corporation v. Bank of Virginia, 544 F. Supp. 386 (D. Md. 1982); *aff'd* 704 F.2d 136 (4th Cir. 1983)	6
Exxon Company, U.S.A. v. Banque de Paris et des Pays-Bas, 889 F.2d 674 (5th Cir. 1989)	3
Exxon Company, U.S.A. v. Banque de Paris et des Pays-Bas, 828 F.2d 1121 (5th Cir. 1987), *vacated* 109 S. Ct. 299 (1988)	5
Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1977)	8
Insurance Company of North America v. Heritage Bank, 595 F.2d 171 (3d Cir. 1979)	6
G. Jaris & Co. v. Banque d'Athenes, 245 Mass. 546 (1923)	6
Kassel v. Consolidated Freightways, 450 U.S. 662 (1981)	*passim*
Kerr Construction Company v. Plains National Bank, 753 S.W.2d 181 (Tex. App.-Amarillo 1987, writ denied)	*passim*
Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960)	12
Liberty National Bank & Trust Co. v. Bank of America, 218 F.2d 831 (10th Cir. 1955)	6
Pike v. Bruce Church Inc., 397 U.S. 137 (1970)	*passim*
STATUTES:	
U.C.C. § 5-109(2)	11
U.C.C. § 5-112	11
U.C.C. § 5-114(1)	11

Table of Authorities Continued

Page

MISCELLANEOUS:

American Bar Association/U.S. Council on International Banking, *An Examination of U.C.C. Article 5 (Letters of Credit)* (1989) 2

J. Dolan, *The Law of Letters of Credit* (1984) 2,9

H. Harfield, *Letters of Credit* (1979) 5,6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1718

BANQUE DE PARIS ET DES PAYS-BAS,
Petitioner,

v.

EXXON COMPANY, U.S.A.,
Respondent.

On Petition for Writ of Certiorari to the Fifth Circuit

BRIEF AS AMICUS CURIAE OF AMERICAN BANKERS ASSOCIATION

The American Bankers Association, with leave of the Court, hereby respectfully submits this brief as amicus curiae to urge the Court to grant the Petition for Writ of Certiorari in the above-entitled case.

INTEREST OF THE AMICUS CURIAE

The American Bankers Association ("ABA") is the principal national trade association of the commercial banking industry in the United States. It represents banks of all types and sizes—national and state-chartered, money center, regional and community banks, bank holding company- owned and independent banks. There are ABA member banks in each of the fifty

states and the District of Columbia, and our banks hold approximately ninety-five percent of the domestic assets of American banks.

Issuing letters of credit is no small part of the banking business. Approximately $200 billion in credits are now outstanding in the United States.[1] As we further develop below, letters of credit have a special role in facilitating interstate and international multiparty transactions. The letter of credit device can only fill that role if all parties to any given transaction have a common understanding of the rules under which they are operating. In recognition of that need, the legislatures of the fifty states have enacted Article 5 of the Uniform Commercial Code, and the international business community, under the auspices of the International Chamber of Commerce, has promulgated and agreed to abide by the Uniform Customs & Practice for Documentary Credits.[2] As the names of both imply, it was the intent of the legislators and businessmen that the rules for letters of credit *be* uniform across jurisdictional boundaries.

The *Exxon* case, for which a petition for writ of certiorari is sought here, was one of two cases proceeding almost in tandem through the court systems—one federal, one state. The other case, *Kerr Construction Company v. Plains National Bank*, 753

---

[1] American Bar Association/U.S. Council on International Banking, *An Examination of U.C.C. Article 5 (Letters of Credit)* (1989) at xi.

[2] *See* J. Dolan, *The Law of Letters of Credit* (1984), ¶ 6.02: "Since 1962, all significant banking centers, with few exceptions, have adopted the Uniform Customs formally or informally and have thereby obviated the plethora of technical problems that could sabotage the smooth operation of documentary credits."

S.W.2d 181 (Tex. App.-Amarillo 1987, writ denied) involved the interpretation and application of Texas law to a transaction involving three parties located and doing business close to one another in the 175,000 population city of Lubbock, Texas. In that case, the intermediate level appellate court concluded that a specific expiry date in a letter of credit need not be strictly enforced. Thereafter, in the *Exxon* case, the Fifth Circuit robotically followed the *Kerr* precedent against its own better inclinations[3] and even though the Texas Supreme Court advised the Fifth Circuit that it did not have to do so.[4] The effect of the court's decision is to apply an interpretation of law developed in a purely local context to a huge multinational corporation and a huge multinational financial institution in a transaction occurring in interstate and international commerce. Since the Amarillo court's interpretation of the law is grossly out of line with law and practice elsewhere, the extension of *Kerr* beyond parties in the locality in which it was handed down creates a major impediment to the smooth operation of letters of credit. The American Bankers Association has a distinct interest in urging this Court to prevent that from happening.

---

[3] "[W]e too must resist the view of sound commercial policy on which we relied in part in *Exxon I*." *Exxon Company, U.S.A. v. Banque de Paris et des Pays-Bas*, 889 F.2d 674, 678 (5th Cir. 1989) (App. 7). ("Exxon II".)

[4] Texas Supreme Court Order (App. 10).

REASONS FOR GRANTING THE WRIT

The Fifth Circuit has decided an important question of federal constitutional law in a way that conflicts with applicable decisions of this Court.

Banque Paribas' Petition for a Writ of Certiorari has already set forth compelling reasons why this Court should entertain a full briefing and oral argument on the merits of this case. The fact that an intermediate appellate state court has rendered an interpretation of state law does not necessarily mean that its interpretation *is* the law of the state. A diversity court, under the *Erie* doctrine, has the same right as any other state court to render a conflicting interpretation of state law until the state Supreme Court holds otherwise. Since the Third Circuit has so applied the *Erie* doctrine, the Fifth Circuit's decision here automatically to follow *Kerr* creates a conflict between the Circuits. Such a conflict needs to be resolved by this Court.

No point would be served by our repetition of the bank's arguments. Instead, we carry the analysis a step further. Even if it is assumed, for purposes of argument, that the *Kerr* decision accurately sets forth the law of Texas (which it does not), that does not mean that the holding of *Kerr* can be applied in the different context in which *Exxon* arose.

A letter of credit transaction arises from the need of one party to a contract to provide financial assurances to the other party. That need may simply derive from the fact that the first party is lacking in the necessary financial strength to be "carried" by the other party. More often than not, however, the letter of credit is issued in a transaction because the

parties are so far separated, geographically or by political boundaries, that it would be difficult, costly, or even impossible for one party to examine the creditworthiness of the other party before entering into the transaction or to enforce its rights against the other party should the transaction fail for whatever reason. (*See generally*, H. Harfield, *Letters of Credit* (1979) at 8-22.) As the Fifth Circuit has recognized itself, earlier in this case, "[t]he credit substitutes a known, accessible, and demonstrably impeccable source of funds in the event of default by the party whose performance it guarantees." *Exxon Company U.S.A. v. Banque de Paris et des Pay-Bas*, 828 F.2d 1121, 1124 (5th Cir. 1987), *vacated* 109 S. Ct. 299 (1988) (App. 40) (hereinafter referred to as "*Exxon I*," the citations to which will be to the Appendix ("App.") to the Petition for Writ of Certiorari).

The letter of credit, while it bears some resemblance to other financial devices, is truly *sui generis*. In recognition of that, there are special rules applicable to letters of credit. In general,

> [a] letter of credit is strictly construed. There is no room for modification, reformation, or interpolation. Paradoxically, this rigidity of construction is essential to the achievement of flexibility in the use of the instrument. Letters of credit may readily be adapted to provide financial support for any transaction. A responsible issuer cannot prudently provide this support without a precise evaluation of the risks involved . . . . [T]he issuer . . . must know who does what and with whom, and must be sure that his expectations in that regard will not be altered.

* * *

> The letter of credit is an invaluable tool that can be employed to facilitate an unlimited variety of transactions. Its utility, however, depends upon recognition of, and sedulous attention to, it essential characteristics. The basic principals of its nature and operation can be altered or ignored only at the price of spoiling the instrument.

Harfield, *Id.* at 2, 5.

In a specific application of this general principal, it is widely recognized that a stated expiry date appearing in a letter of credit must be strictly enforced. *See, e.g., Insurance Company of North America v. Heritage Bank*, 595 F.2d 171, 174-175 (3d Cir. 1979); *Liberty National Bank & Trust Co. v. Bank of America*, 218 F.2d 831, 840-41 (10th Cir. 1955); *Consolidated Aluminum Corporation v. Bank of Virginia*, 544 F. Supp. 386, 393-94 (D. Md. 1982); *aff'd* 704 F.2d 136 (4th Cir. 1983); *City National Bank v. Westland Towers Apartments*, 152 Mich. App. 136 (1986); *G. Jaris & Co. v. Banque d'Athenes*, 245 Mass. 546, 141 N.E. 576, 577 (1923); *See also* H. Harfield, *Letters of Credit* (1979) at 36. Until this case and *Kerr*, no court, to our knowledge had ever held that an expiry date in a letter of credit would be extended or payment conditions modified because of "impossibility." In this case, the letter of credit at issue required Exxon to draw against the letter not later than October 31, 1981. When Exxon sought to draw against it on November 30 and December 1, 1981, the bank refused to honor the draw. In the *Kerr* case, the letter of credit provided that a draw against the letter had to be made by July 1, 1985. When the City of

Lubbock attempted to draw against the letter on July 17, 1985, the bank likewise refused to honor it. The *Kerr* court, unlike most other courts, refused to enforce the letter as written. The *Kerr* decision is, therefore, an aberration in otherwise commonly interpreted law.

The courts in Amarillo, Texas, may wish to take the local commercial practices of their own area and secede from the state, the union and the planet. But under our federal system, the black hole they create when they go cannot be permitted to suck in the rest of the universe of interstate and international transactions after them. This Court has effectively so held in *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959) and subsequent cases. Where the Fifth Circuit has effectively authorized such an impediment to interstate commerce, it has acted inconsistently with the direction from this Court.

Bibb was the famous Illinois mudguard case. The State of Illinois, by statute, prescribed precise and exacting standards for the mudguards that were required for trucks operating on the roads in that state. There was nothing inherently good or bad about the specifications; as in this case, there was no federal statute or regulation with which Illinois law conflicted; and the law purported to apply only within the borders of the State. Nevertheless, this Court struck down the statute as applied. The problem with Illinois law was that it was an aberration. It was inconsistent with the uniform industry standard. Mudguards complying with the industry standard were legal in forty-five other states, and mudguards complying with Illinois law would have been *illegal* in at least one other state. The effect of the law, therefore,

was to require trucks moving in interstate commerce to stop at the border of Illinois and change their mudguards, incurring lost time and expense in doing so, to no great advantage of anyone. It served only as an impediment to the "policy of free trade reflected in the Commerce Clause," *Bibb*, 359 U.S. at 529.

It is clear from the *Bibb* opinion that there was no concern over the need for one particular style of mudguard over another. The concern was only over the need for some—any—kind of uniformity among various jurisdictions in this area.

Similarly, in *Kassel v. Consolidated Freightways*, 450 U.S. 662 (1981), the State of Iowa disallowed the use of 65-foot double trailer trucks within the borders of the state. At the time, all other states in the midwest and west allowed them. Such trucks were widely used and preferred in the trucking industry because of their greater capacity and the easy ability to detach the trailer and route it separately as needed. Consolidated Freightways challenged the constitutionality of the statute. At trial, it was found that 65-foot double trailers were as safe as the 55-foot single trailers otherwise used and allowed in Iowa. This Court held the Iowa statute to be an unconstitutional impediment to interstate commerce:

> [T]he (Commerce) Clause itself is 'a limitation upon state power even without congressional implementation.' *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 350 (1977). The Clause requires that some aspects of trade remain free from interference by the States. When a State ventures excessively upon the regulation of

> these aspects of commerce, it 'trespasses upon national interests' . . . and the courts will hold the state regulation invalid under the clause alone.

Id. at 669 (citation omitted.).

Finally, in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), this Court set forth the analytical framework for determining which state laws could constitutionally affect interstate commerce and which could not:

> Where the statute regulates evenhandedly[5] to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142.

These are the principals which govern this case as well. Unlike *Bibb*, *Pike* and *Kassell*, there does not

---

[5] This is the kind of determination that "lends itself well to the courtroom setting of legal briefs, oral arguments, and expert testimony on industry practices and to lengthy review of prior transactions. It does not lend itself well to the bank letter-of-credit department, where document examiners must review the documents against the credit and decide promptly whether to honor the beneficiary's draft. The kind of inquiry that the minority rule commands takes more time and requires more legal analysis than document examiners can give and more than the credit transaction can afford." J. Dolan, *The Law of Letters of Credit* ¶ 6.02 (1984).

seem to be any colorable local interest at all in construing letters of credit "liberally," whereas strict construction is the rule elsewhere. Certainly, the Texas legislature (the body one normally would look to for expressions of the public policy of the state) has not spoken to that specific issue—other than by its enactment of the *Uniform* Commercial Code, Article 5 which governs letters of credit in all fifty states.[6] As in at least *Bibb* and *Kassel*, there is a need for uniformity in the interpretation and application of letter of credit law insofar as interstate and international transactions are concerned. This is not merely a representation by the banking industry made in its own self interest. To the contrary, the Fifth Circuit itself, in *Exxon I*, *found* the need for uniformity to be critical and *found* the rule it has now adopted to be disruptive of that uniformity:

- The function of letters of credit *requires* that they be succinct and clear, for their utility lies in the assurance they provide that payment will

---

[6] The courts give especial scrutiny to those state laws which do not regulate "evenhandedly" but are alleged to discriminate in favor of local commerce and against interstate commerce. No such "discrimination" is involved in this case: The Texas Court of Appeals at Amarillo would apparently have resolved the issue the same way whether a local bank or an out-of-state bank had issued the letter of credit involved in the *Kerr* case. However, it was not necessary for anyone to plead and prove "discrimination" in either *Bibb*, *Kassel* or *Pike* in order for the challenged statutes to be struck down. It was sufficient in each case to show the "burden" on interstate commerce alone. Similarly, courts give special scrutiny to state laws claimed to be incompatible with governing federal law. No contrary federal law applies here and none is asserted. But neither was there contrary federal law at issue in *Bibb*, *Pike* or *Kassel*.

be made *on the specified terms* without delay or litigation. (App. 36) (emphasis added.)

- Letters of credit facilitate commercial transactions, particularly in international commerce, by assuring certainty in application, *consistency in interpretation across jurisdictional boundaries*, and swiftness in execution. (App. 40) (emphasis added.)
- A letter of credit is therefore strictly construed. (App. 41)
- Good banking practice and common sense require that the bank's liability terminate at a date certain. (App. 43)
- In letter-of-credit transactions, as in many other legal areas, certainty of result and practicality of performance by laymen are of paramount importance. (App. 45)

When a banker sitting, for example, in New York, receives a claim under a letter of credit, he is obligated to honor it if it appears regular on its face or dishonor it if it does not. U.C.C. Sections 5-109(2), 5-114(1). The banker has three banking days to decide which to do. U.C.C. Section 5-112. So long as the law is uniform and strictly construed, that does not ordinarily present a problem.

But the normal procedures for processing claims cannot afford to have a footnote which says "except in Texas, or maybe only in the 7th District of Texas (we're not sure), in which case considerations other than facial regularity or irregularity apply, but we don't know what those considerations are." That is what *Kerr*, and now the Fifth Circuit, would require

of bankers everywhere whose letter of credit transactions might touch upon a party with a Texas (or Texas Panhandle) connection.[7] It would take longer to sort through that exception to otherwise commonly followed practices than it would to change mudguards on a truck.

Finally, in *Bibb* and in *Kassel*, the state laws under attack were not challenged as being inconsistent with the *laws* of other states (except in one isolated instance in the *Bibb* case). Other states did not *require* shippers to use 65-foot double trailers; most other states did not *require* straight mudflaps instead of curved mudguards. To the contrary, the Illinois and Iowa statutes were challenged as contrary to reasonable nationwide private industry practices *allowed* by laws in other jurisdictions. Here, the fact of the matter is that it is universal industry practice for issuers of letters of credit to include a specific expiry date in each letter,[8] to expect that such specific expiry dates will be honored as written, and to act upon that expectation. The laws of other jurisdictions give effect to industry practice. Texas (or the 7th District of Texas) cannot act in such a fashion as to defeat those

---

[7] The fact that Texas (or the 7th judicial district of Texas) common law is involved in this case and is asserted to be an impediment to interstate commerce whereas there were state statutes involved in *Bibb*, *Kassel* and *Pike* is of no relevance. State common law which conflicts with the Constitution is as invalid as state statutes or regulations which do so. *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960).

[8] As the Fifth Circuit itself recognized, "Article 37 of the Uniform Customs (and Practice for Documentary Credits) requires all letters of credit made subject to it to stipulate an expiry date. Paribas' letter of credit expressly incorporated by reference the Uniform Customs" *Exxon I*, App. 42.

just and reasonable expectations of the industry nationwide and worldwide or, standing alone, dictate a nationwide or worldwide sea change in the way the letter of credit business is conducted without constituting a burden upon interstate and international commerce. The burden is an excessive one and it is "balanced" against no known or articulated or even imaginable "public interest" of the local jurisdiction.

CONCLUSION

Bibb v. Navajo Freight Lines and its progeny recognize the broad and pervasive power of States to regulate commerce within their borders, even where such regulation may have an impact upon interstate commerce. Nevertheless, the Court has regularly recognized that there are circumstances in which a state may stray so far from the norm that its policies cannot be permitted to obstruct free trade. It is a matter of proof. Here, the fifty states (including Texas) have set forth their public policy in favor of consistent legal treatment of letters of credit by enacting a uniform law, Article 5 of the Uniform Commercial Code (a statute flatly ignored in the *Kerr* decision). The Fifth Circuit, likewise, originally determined that uniformity of legal treatment was critical in this area. More proof than that is hardly needed. And yet, the bottom line of the Fifth Circuit's opinion is to sanction the

very kind of aberrant and obstructive local law condemned by this Court in *Bibb*, *Pike* and *Kassel*. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOHN J. GILL III
General Counsel
Counsel of Record

MICHAEL F. CROTTY
Deputy General Counsel
for Litigation

AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5026

Attorneys for Amicus Curiae

No. 89-1718

Supreme Court, U.S.
FILED
JUN 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BANQUE DE PARIS ET DES PAYS-BAS,

Petitioner,

—v.—

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

DONALD F. LUKE
Counsel of Record
KENNETH L. MILLER
NANCY L. HAHN
Rogers & Wells
200 Park Avenue
New York, New York 10166
(212) 878-8000

Of Counsel:

HENRY PAUL MONAGHAN
435 West 116th Street
New York, New York 10027
(212) 854-2644

ROBERT HAYDEN BURNS
CONSTANCE O'DOHERTY BARNES
Butler & Binion
1600 Allied Bank Plaza
Houston, Texas 77002
(713) 237-3171

Attorneys for Petitioner

BEST AVAILABLE COPY

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	6

TABLE OF AUTHORITIES

Cases: PAGE

Benante v. *Allstate Ins. Co.*, 477 F.2d 553 (5th Cir. 1973) 2

Birmingham Fire Ins. Co. v. *Winegardner & Hammons, Inc.*, 714 F.2d 548 (5th Cir. 1983) 3, 5

Colorado Interstate Gas Co. v. *Hufo Oils*, 802 F.2d 133 (5th Cir. 1986) 3, 5

Commissioner v. *Estate of Bosch*, 387 U.S. 456 (1967) 3, 4

Erie R.R. v. *Tompkins*, 304 U.S. 64 (1938) 3

Ferens v. *John Deere Co.*, 110 S. Ct. 1274 (1990) .. 6

Ground Air Transfer, Inc. v. *Westates Airlines, Inc.*, 899 F.2d 1269 (1st Cir. 1990) 3, 5

Gruber v. *Owens-Illinois Inc.*, 899 F.2d 1366 (3d Cir. 1990) 3, 5

Kerr Constr. Co. v. *Plains Nat'l Bank*, 753 S.W.2d 181 (Tex. App.—Amarillo 1987, writ denied) 1-2

Mott v. *Mitsubishi Int'l Corp.*, 636 F.2d 1073 (5th Cir. Unit A Feb. 1981) 3, 5

Sifers v. *General Marine Catering Co.*, 892 F.2d 386 (5th Cir. 1990) 2-3, 4-5

Tafflin v. *Levitt*, 110 S. Ct. 792 (1990) 3

West v. *American Tel. & Tel. Co.*, 311 U.S. 223 (1940) 4

Other:

J. Friedenthal, M. Kane & A. Miller, *Civil Procedure* (1985) 3

19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4507 (1982) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1718

BANQUE DE PARIS ET DES PAYS-BAS,

Petitioner,

—v.—

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Banque de Paris et des Pays-Bas (now known as Banque Paribas) (the "Bank")[1] submits this brief in reply to the Brief in Opposition of Exxon Company, U.S.A. ("Exxon") and in further support of the Bank's petition for a writ of certiorari.

ARGUMENT

Exxon's strategy in opposing this petition is both predictable and understandable: try to bury the important institutional questions presented by recasting the petition as presenting nothing more than the question whether, after *Kerr Construction Co.* v. *Plains National Bank*, 753 S.W.2d

1 The parent and non-wholly-owned subsidiaries of the Bank are listed in the Appendix to the Bank's petition for a writ of certiorari ("App."), at pages 60-67.

181 (Tex. App.—Amarillo 1987, writ denied), the court of appeals *finally* understood that Texas law provides that "letters of credit are governed by the same maxims of construction as ordinary contacts [sic]." (Brief in Opposition ("Opp.") 7). Fully nine of the fourteen pages of the Brief in Opposition are devoted to this effort. Of course, if Exxon's recharacterization were correct, the petition would raise an issue of no conceivable interest to this Court. (*See* Petition ("Pet.") 3).

But Exxon is not correct. This petition is not concerned with whether *Kerr* was correctly decided; nor is it concerned with Texas letter of credit law when a conflict exists between the presentment terms and the expiry date. Rather, this petition raises issues of systemic importance that in no way depend on the actual content of Texas law. The petition focuses on the *process* that the Fifth Circuit wrongly understood to be obligatory in determining the content of the applicable state law once any intermediate state court has addressed the issue. And as the Bank has said, precisely because this Court does not review the particular determinations of applicable state law in diversity cases it is imperative that this Court ensure that diversity courts proceed in a correct manner in determining state law. (Pet. 6).

I.

Once Exxon's effort to deflect attention from the issues actually raised by the petition is unmasked, the weakness of its opposition to certiorari becomes apparent. Exxon first denies the existence of any deeply-entrenched Fifth Circuit policy that accords virtually absolute deference to *any* pertinent intermediate appellate court decision. (Opp. 8). This argument is made in the face of contrary decisions in the Fifth Circuit. (*See* Pet. 8). "Only where no state court has decided the point in issue may a federal court make an educated guess as to how that state's supreme court would rule." *Benante* v. *Allstate Ins. Co.*, 477 F.2d 553, 554 (5th Cir. 1973); *see also Sifers* v. *General Marine Catering Co.*, 892

F.2d 386, 397 (5th Cir. 1990); *Colorado Interstate Gas Co.* v. *Hufo Oils*, 802 F.2d 133, 140-41 (5th Cir. 1986); *Birmingham Fire Ins. Co.* v. *Winegardner & Hammons, Inc.*, 714 F.2d 548, 550 (5th Cir. 1983); *Mott* v. *Mitsubishi Int'l Corp.*, 636 F.2d 1073, 1074 (5th Cir. Unit A Feb. 1981).

The petition stresses that the crucial difficulty with the Fifth Circuit's policy is that, contrary to *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), it gives federal court litigants a brand of justice inferior to that accorded in the state courts. (Pet. 8-10). This is the necessary consequence of a policy that, in determining state law, accords to a single decision of a state intermediate appellate court greater weight than it would be accorded by the state's highest court or indeed by any of the thirteen other Texas intermediate appellate courts. The petition submits that the Fifth Circuit's policy is completely at odds with this Court's decision in *Commissioner* v. *Estate of Bosch*, 387 U.S. 456 (1967). (Pet. 10-12).

Exxon's response to *Bosch* is startling. Exxon argues that *Bosch* is irrelevant because *Bosch* was not a diversity case. (Opp. 11). This argument is far wide of the mark. This Court, lower federal courts and commentators understand that the analytical approach set forth in *Bosch* for determining the content of relevant state law is fully applicable to diversity cases. *See, e.g., Tafflin* v. *Levitt*, 110 S. Ct. 792, 798 (1990) (citing *Bosch* for the proposition that "federal courts sitting in diversity are guided by state court interpretations of state law"); *Gruber* v. *Owens-Illinois Inc.*, 899 F.2d 1366, 1369 (3d Cir. 1990) (finding *Bosch* provides the "current practice [for ascertaining state law] in diversity cases"); *Ground Air Transfer, Inc.* v. *Westates Airlines, Inc.*, 899 F.2d 1269, 1275 (1st Cir. 1990) (citing *Bosch* as the current standard for ascertaining state law in a diversity case); J. Friedenthal, M. Kane & A. Miller, *Civil Procedure* 220 (1985); 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4507, at 88 (1982). Indeed, *Bosch* itself explicitly recognized that its analysis applied whenever the content of state law serves as the applicable rule of decision

in federal court. This, of course, includes the diversity context:

> *This is not a diversity case but the same principle may be applied for the same reasons, viz.*, the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the State.

387 U.S. at 465 (emphasis supplied); *see also id.* at 477 (Harlan, J., dissenting, joined by Fortas, J.) (stating their understanding of "the formula now ordinarily employed to determine state law in diversity cases" to be that "absent a recent judgment of the State's highest court, state cases are only data from which the law must be derived").

It is apparent, however, that the Fifth Circuit's policy of "conclusive regard" has effectively supplanted the "proper regard" for state intermediate appellate court decisions that *Bosch* mandates. Indeed, Exxon virtually concedes the point. It defends the court below (Opp. 10) by placing reliance on *West* v. *American Tel. & Tel. Co.*, 311 U.S. 233, 237 (1940), and two other decisions in Volume 311 U.S.—"the excesses of 311 U.S.," as Judge Friendly described them. (*See* Pet. 11). To the extent that *West* supports the Fifth Circuit's deference policy it is in conflict with *Bosch* and should be rejected. (*See* Pet. question (2), 10-12).

The need for this Court's corrective action is especially evident from the bizarre outcome in this case. Because of a single, unreasoned intermediate state court opinion, the Fifth Circuit felt obliged to reverse itself and affirmatively reject "sound commercial policy" (App. 7) in a case involving a common commercial instrument. Indeed, in the Fifth Circuit the only way a litigant can avoid the conclusive effect of a single intermediate appellate court holding is somehow to prove an impossible negative; *i.e.*, that the intermediate court holding is not the law of the state. *E.g.*, App. 3, 4; *Sifers*,

892 F.2d at 397; *Colorado Interstate Gas Co.*, 802 F.2d at 140-41; *Birmingham Fire Ins. Co.*, 714 F.2d at 550; *Mott*, 636 F.2d at 1074. *Erie* does not permit the federal appellate courts to cede so much decision-making authority to the decisions of inferior state courts.

II.

Exxon's attempt to dismiss the conflict in approaches between the Fifth and Third Circuits is also illuminating. This conflict is asserted to be "purely imaginary." (Opp. 12). But the conflict is real, as is apparent from Exxon's lame effort to distinguish two Third Circuit decisions as cases that are "*sui generis*." (Opp. 13). Moreover, the conflict has been brought into even sharper focus by the Third Circuit's very recent decision in *Gruber* v. *Owens-Illinois Inc.*, 899 F.2d 1366 (3d Cir. 1990). There, in an extended discussion relying upon *Bosch*, the court emphasized yet again that it could not be bound by a holding of an intermediate state court.

The genuine conflict among the circuits on the approaches diversity courts take in determining and applying state law is further revealed in the recent First Circuit decision, *Ground Air Transfer, Inc.* v. *Westates Airlines, Inc.*, 899 F.2d 1269 (1st Cir. 1990). In that diversity case (which, coincidentally, involved a letter of credit), the First Circuit undertook a painstaking independent analysis of controlling California law. On the basis of that analysis, and relying specifically on *Bosch*, the First Circuit rejected the views of two California intermediate appellate courts because the First Circuit was convinced the California Supreme Court would hold differently. *See id.* at 1275. In so doing, the process by which the First Circuit determined state law differed radically from the policy of deference consistently followed by the Fifth Circuit.

The Bank submits that it is quite apparent that the circuits have adopted widely divergent processes when faced with determining the deference due intermediate state court opinions. This petition presents the Court with a salutary occa-

sion to resolve this systemic problem and provide much needed guidance to the lower federal courts to ensure that *Erie* retains its vitality as an "expression of the federal system and the concomitant integrity of the separate States." *Ferens* v. *John Deere Co.*, 110 S. Ct. 1274, 1280 (1990).

CONCLUSION

For the foregoing reasons and those set forth in the Bank's petition, the petition for a writ of certiorari should be granted.

Dated: New York, New York
June 11, 1990

Respectfully submitted,

DONALD F. LUKE
Counsel of Record
KENNETH L. MILLER
NANCY L. HAHN
Rogers & Wells
200 Park Avenue
New York, New York 10166
(212) 878-8000

Of Counsel:

HENRY PAUL MONAGHAN
435 West 116th Street
New York, New York 10027
(212) 854-2644

ROBERT HAYDEN BURNS
CONSTANCE O'DOHERTY BARNES
Butler & Binion
1600 Allied Bank Plaza
Houston, Texas 77002
(713) 237-3171

Attorneys for Petitioner